The Central Law Journal.

*ST. LOUIS, MARCH 15, 1889.*

## CURRENT EVENTS.

A JUDGMENT, recently delivered by Mr. Justice North in one of the English courts, settles, at least so far as that country is concerned, an important question of law concerning which much difference of opinion has existed, and will interest photographers on this side of the water. There a photographer, who had, in the ordinary course of business, taken the photographs of plaintiff and his wife, claimed the right to print extra copies and expose and display them in his shop window. The court granted the injunction, which was asked to restrain such action, on the part of the photographer, and held that the latter's claim was wholly unfounded, upon the general principle which precludes a person in confidential employment from disclosing knowledge of which, by means of his employment, he has become possessed. A person cannot be photographed and supplied with printed copies except by enabling the photographer to obtain a negative, which must be left in his hands, in order that the prints may be taken, and which is, there seems no doubt, his property. But his use of it is restrained by the right of the sitter, somewhat in the same way that a letter, so far as the paper and writing are concerned, is the property of the receiver, who, nevertheless is restrained from publishing it without the consent of the writer. The decision appears to apply only to cases in which the sitter has ordered photographs in the customary manner of business and not to the numerous instances in wnich persons of celebrity have been invited by photographers to sit for them, evidently in order that the resulting portraits may be sold.

We are aware of no decision on the precise point in this country, though the question has arisen as to the right of a photographer to sell copies of negatives taken by him, and the Supreme Court of the United States in the notable quarrel between Oscar Wilde and Sarony, a New York photographer, held that the latter was entitled to a copyright for his work in the artistic production of a picture of the former.

THAT lawyers will do well to be cautious and wary in the communications of their plans, is well illustrated by the experience of a New York attorney, of whom Demot Enmot writes in the Albany Law Journal. It seems that the former, a well-known practitioner stated to a friend with whom he was lunching, "I expect to go out to Cincinnati tomorrow to put the Big Scheme and Great Scott R. Co., in the hands of a receiver." Now it happened that a great division bad arisen among the security holders of the Big Scheme & G. S. R. Co., and one of the holders opposed in interest to the clients of S. Mart Aleck, Esq., overheard his remark, and rushed to his lawyer's office with the announcement of his opponent's plan. The latter, remembering the legal maxim that the early applicant catches the receiver, packed his grip and was soon whirling toward the western jurisdiction. His bill had been prepared, and he lost no time in applying for his receiver, who was speedily appointed. Mr. Aleck arrived twelve hours later to find that Big Scheme, etc., had been duly "received." and he now will advise his clients how they can most gracefully hold the bag for the other side.

OUR readers will find, in this issue of the JOURNAL, an admirable presentation of the question, as to the right of the United States government, under the measure known as the Oklahoma bill, to declare forfeited the lands claimed by the Cherokee Indians. The article is from the pen of E. G. Taylor Esq., of Kansas City, and states clearly and concisely the legal contention of those favorable to legislation in that direction. It is intended as an answer to the article of Frank P. Blair Esq,, which appeared in the JOURNAL of February 15. In publishing it, we have accomplished all that was desired, which was to obtain an expression of opinion, from both sides of the controversy, and by those who have made the subject a study. We must confess on our own part, and in so declaring

we are undoubtedly stating the experience of our readers, to a very considerable degree of ignorance heretofore on this subject. The title or tenure by which the Cherokee tribe claims this immense tract of land, has been somewhat vague in our mind. But, thanks to Messrs. Blair and Taylor, we are much enlightened. Our readers can, and will no doubt, take their choice and come to a conclusion, as to the merits of this much mooted question, without assistance from us. But it will be noted that both debaters agree on all the material questions, as to the provisions of the treaty and patent under which the Cherokees claim. Mr. Blair contends that their tenure thereunder is an absolute fee-simple. Mr. Taylor argues that it is a determinable fee and subject to reversion.

We have no doubt, at least, that the intention of the Government was, at the time, to grant this land absolutely and irrevocably to the Indians, even though a strict construction of the treaty and patent, and the demands and exigencies of civilization, may now seem to justify what is popularly known as "Injun giving."

---

THE death, on February 21st, of Francis Wharton, D. D., L. L. D., removes one who for almost half a century has been prominent in the legal literature of this country, and whose writings are conspicuous for their learning and scholarly research. He began his literary career early in life as editor of the Philadelphia Episcopal Recorder, and in 1846 published "a Treatise on the Criminal Law of the United States." This book went through six editions and to-day justly remains a work of high authority. Thereafter he wrote many books the best known being "Contracts" "Criminial Pleading and Practice" "Negligence" "Homicide" and "Digest of International Law." The latter is a recognized standard authority. At the time of his death he was engaged in the completion of his latest literary work—"The Diplomatic History of the United States in the Revolutionary Period," having been selected by a resolution of congress, to put in shape the Revolutionary diplomatic correspondence of this country.

## NOTES OF RECENT DECISIONS.

IN Kimmish v. Ball, 9 S. C. Rep. 277, the Supreme Court of the United States passed upon the validity of a statute of Iowa, making a person having in his possession, within that State, any Texas cattle which have not been wintered north of the southern boundary of Missouri and Kansas, liable for any damages that may occur from allowing them to run at large and thereby spreading the disease known as the "Texas fever." The statute is found in § 4059 of the Code of Iowa, which refers to the preceding § 4058. Plaintiff claimed damages of defendant for breach of this statute, and defendant demurred on the ground that the sections are in conflict with the constitution of the United States, in that the legislature of Iowa undertakes by them to regulate and interfere with interstate commerce, relying upon Railroad Co. v. Husen, 95 U. S. 465, wherein a Missouri statute of similar character was declared invalid. Mr. Justice Field, in upholding the validity of this statute and reversing the decision of the lower court, says:

Nor does the case of Railroad Co. v. Husen, 95 U. S. 465, upon which the defendant relies with apparent confidence, have any bearing upon the questions presented. The decision in that case rested upon the ground that no discrimination was made by the law of Missouri in the transportation forbidden between sound cattle and diseased cattle; and this circumstance is prominently put forth in the opinion. "It is noticeable," said the court, "that the statute interposes a direct prohibition against the introduction into the State of all Texas, Mexican, or Indian cattle during eight months of each year, without any distinction between such as may be diseased and such as are not." It interpreted the law of Missouri as saying to all transportation companies: "You shall not bring into the State any Texas cattle, or any Mexican cattle, or Indian cattle, between March 1st and December 1st in any year, no matter whether they are free from disease or not, no matter whether they may do an injury to the inhabitants of the State or not; and if you do bring them in, even for the purpose of carrying them through the State without unloading them, you shall be subject to extraordinary liabilities." Such a statute, the court held, was not a quarantine law, nor an inspection law, but a law which interfered with interstate commerce, and therefore invalid. At the same time the court admitted unhesitatingly that a State may pass laws to prevent animals suffering from contagious or infectious diseases from entering within it. No attempt was made to show that all Texas, Mexican or Indian cattle coming from the malarial districts during the months mentioned were infected with the disease, or that such cattle were so generally infected that it would have been impossible to separate the healthy from the diseased. Had such proof been given, a different question would have been presented for the consideration of the court. Certainly all animals thus

infected may be excluded from the State by its laws until they are cured of the disease, or at least until some mode of transporting them without danger of spreading it is devised. Railroad Co. v. Husen, gives no support to the contention of the defendant,

---

IN Miller's Admx. v. Newburg Orrel Coal Co., 8 S. E. Rep. 600, the Supreme Court of Appeals of West Virginia passed upon an important question as to *de facto* corporations. The specific question to be determined was whether or not a duly incorporated and organized corporation, which continues its corporate business in its corporate name after the time fixed by its charter for its duration has expired, can be sued and made liable as a corporation *de facto* for a tort committed by it after the limit fixed by its charter had expired. The court says:

There can be no doubt that it was the duty of the directors, under the provisions of statute, to wind up its business when its charter expired; but the facts show that they did not do so. On the contrary, the corporation continued to prosecute its business in its corporate name just as it had done before its charter expired. It continued to exist, as a matter of fact, after its franchise or legal right to exist had expired. It thus became a corporation *de facto*, but not *de jure*. As such *de facto* corporation it certainly possessed no special powers, such as the power to condemn property, and other like powers, which the laws confers only upon corporations existing by legal right. But the courts cannot reasonably ignore the existence of such a corporation, if it is an immutable fact; nor are the acts and dealings had by and with it necessarily legally ineffective and of no binding force. Gas Light Co. v. City of St. Louis, 11 Mo. App. 55: Briggs v. Canal Co., 137 Mass. 71. The scope of the powers of the officers and agents of a corporation *de facto* must be fixed in the same manner as in case of a corporation *de jure*. Therefore, if an association assumes to carry on business, or enter into contracts in a corporate capacity, under an expired charter, and those dealing with it treat it as if it were a corporation, the individual members of such association cannot be made liable, either severally or jointly, or as partners. This is equally true whether the association was in fact a corporation or not, or whether the dealing with the association in its corporate capacity was authorized by the legislature, or prohibited by law, and illegal. If an association assumes a liability, or enters into a contract as a corporation, it is clear the members of the association do not agree to be bound as individuals, either jointly or severally; nor do they agree to be bound as partners to each other, or to those dealing with the association. It is equally true that the parties dealing or contracting with them do not intend to bind them individually. To treat the individuals as parties to such transactions would, therefore, involve not only the nullification of the act which was actually contemplated by the parties on both sides, but the creation of a different obligation, which neither of the parties intended to make. 2 Mor. Priv. Corp. § 748. It is a general rule that a party who has contracted with an association assuming to be a corporation, and acting in a corporate capacity, cannot, after having received the benefit of the contract, set up as a defense to an action brought upon it by the corporation that the latter was not a legal corporation, or had no authority to make the contract in a corporate capacity. Brouwer v. Appleby, 1 Sandf. 158. This rule does not rest upon the doctrine of estoppel, as has sometimes been said, but is founded upon the policy of the common law prohibition against unauthorized corporate action. Bradley v. Ballard, 55 Ill. 413; City of St. Louis v. Gas Co., 70 Mo. 69. The same rule is applicable in a suit brought against a corporation upon a contract which has been performed by the other party. A company which has entered into a contract in a corporate capacity cannot, after the contract has been performed by the other party, set up, as a defense to an action for damages, that it was not a *de jure* corporation. Dooley v. Glass Co., 15 Gray, 494; Manufacturing Co. v. Stuart, 46 Mich. 482, 9 N. W. Rep. 527. The same rule applies in suits upon other classes of liabilities by or against *de facto* corporations. Imboden v. Mining Co., 70 Ga. 86; 2 Mor. Priv. Corp. §§ 751, 755; Manufacturing Co. v. Bennett, 28 W. Va. 16. The principles, it seems to me, to be deduced from our statute and these authorities, is that a private business corporation, acting and carrying on its corporate business in its corporate name, after its legal existence has ended by the expiration of its charter, must be held to be a corporation *de facto;* and that as such, so long as it in fact so carries on its business, and contracts or incurs liabilities with or to third persons dealing with it as such *de facto* corporation, it may sue and be sued at law, either in actions *ex contractu* or *ex delicto*, and it cannot defeat such action by alleging that its charter had expired before the cause of action arose.

---

THE Supreme Court of Ohio, in the case of Hill v. Myers, 19 N. E. Rep. 593, decided a question as to the right of a married woman to claim a homestead. The defendant, a married woman, signed a note jointly with her husband, intending to charge her separate estate with the amount. Plaintiff obtained a judgment on the note. Subsequently to the rendition thereof, but prior to any order of sale, she moved into and occupied a part of her separate estate as a family homestead, and therefore claims that a homestead therein should be assigned to her. The plaintiff denies her right of homestead, contending that before defendant had taken any steps towards its acquisition, the plaintiff had acquired an interest in the estate equal to a levy. The court, in allowing the claim of homestead, says:

By virtue of the amendments of section 28 of the Code of Civil Procedure, which are subtantially embodied in sections 4996 and 5319 of the Revised Statutes, a radical change has been effected in the remedy against married women. Though the object of this legislation was not to enlarge or vary the liabilities of a married woman, it fundamentally changed the form of the remedy. Jenz v. Gugel, 26 Ohio St. 527; Allison v. Porter, 29 Ohio St. 136. The disabilities of coverture are so far removed that, where the action concerns her separate property, a personal judgment may be rendered against her in all cases where such judgment

would be proper were she a *feme sole*. Such judgment may be enforced in all respects as if she were an unmarried woman. Execution may be issued against her separate property and estate, to the same extent as against the property of her husband, were the judgment rendered against him; and the same rule will apply to her, for the purpose of setting off a homestead in her property about to be levied upon, that applies to her husband. In instituting suit against her, it is enough to aver that she has separate property subject to be charged, without describing any specific piece of property, as it is not necessary by decree to subject any particular piece. Insurance Co. v. Babcock, 42 N. Y. 613, App. But, in proceeding by way of execution against the wife's separate property, the law has, in a liberal and humane spirit, guarded all her rights of homestead. It is provided by section 5319 of the Code of Civil Procedure, that she shall be entitled to the benefit of all exemptions to heads of families. Before levy of execution or seizure under an order of sale she may impress upon her land the homestead character, so that, upon her application at any time before sale, a homestead shall be set off to her by metes and bounds. And not only may she before such levy and seizure dedicate and secure a homestead, by visible occupancy, in the land of which she holds the title, but, if she has become the owner of the superstructure of a dwelling-house occupied by her as a family homestead, although the title to the land is in another, she will be protected in the enjoyment of her homestead as against the judgment of a creditor. With the changed remedy against a married woman, allowing a personal judgment followed by execution, goes *pari passu* the statutory protection of her homestead. And, where no specific lien upon her separate estate has been created, the force and effect of the statute cannot be frustrated by setting out in the petition a description of specific separate property, and rendering a decree that such property shall be applied to the payment of the wife's obligations—where she has asserted by use and occupation a right of homestead—before the issue of an order of sale. To such a decree we do not attach the effect of a levy, nor can the wise and benevolent policy of the law be thus defeated. In authorizing a homestead to be set off to the debtor in the lands and tenements "about to be levied upon," the statute contemplates that he may establish his right to a homestead, by use and occupation of the property before steps have been taken by a levy or seizure under an order of sale to enforce the judgment. It is to the enforcement of the decree or judgment that the prior use and occupation of the property for a homestead must be referred.

It is also held in this case that the fact that the homestead was claimed in lands held by the wife as co-tenant of an undivided interest did not prevent an assignment of homestead. And the case of Gaylord v. Imhoff, 26 Ohio St. 317, is distinguished. In that case it was held that the members of an insolvent firm are not entitled to the statutory exemptions out of the partnership property. The court says that that case did not involve a consideration of the exemption of partnership lands when claimed as homesteads—that the incidents annexed to partnership and tenancy in common are diverse."

An interesting question in the law of carriers of passengers came before the Supreme Court of Louisiana, in Conelly v. Crescent City R. Co., 5 South. Rep. 259. The facts were that plaintiff's husband entered defendant's street car. He was suddenly stricken with appoplexy, accompanied with severe vomiting. The car had numerous passengers, to whom this occasioned serious discomfort. In this condition he fell on the floor of the car. The driver, with the assistance of a passenger, lifted him out of the car and laid him down in the street near the gutter. The driver then drove away. Here he remained helpless for several hours, exposed to inclement weather, and without aid or relief. The defendant contended that to all appearances the man was intoxicated, and that in removing him it performed a duty to the other passengers. The court, in overruling this defense, says:

It should need no parade of learned authorities to maintain the proposition that a common carrier cannot treat an unfortunate passenger, stricken with apoplexy while under its charge, in the manner above indicated, without a breach of the plainest obligations of its contract of carriage. If there were any precedent to the contrary, humanity would revolt at it, and it would be one "more honored in the breach than the observance." But there is no such precedent, and those cited by defendant's counsel are far from sustaining their position. No doubt a carrier owes obligations to its well passengers as well as to sick passengers, and is bound to protect the rights of both. When the condition of a sick passenger is such that his continued carriage is inconsistent with the safety, or even the reasonable comfort, of his fellow-passengers, regard for the rights of the latter will authorize the carrier to exclude him from the conveyance. Thus, if he had cholera, or small-pox, or *delirium tremens*, or even if, as in this case, he were subject, from any cause, to continuous vomiting, utterly inconsistent with the comfort of other passengers in a street car, the right of the carrier, in protection of the latter's privileges, to exclude him would undoubtedly arise. Such is the reasonable doctrine of the cases cited. Lemont v. Railroad Co., 47 Am. Rep. 238; Vinton v. Railroad Co., 11 Allen, 304; Murphy v. Railroad Co., 118 Mass. 228; Railroad Co. v. Weber, 33 Kan. 543, 6 Pac. Rep. 877; Railroad Co. v. Statham, 42 Miss. 607. But none of these cases hold that this right of exclusion may be exercised arbitrarily and inhumanely, or without due care and provision for the safety and well being of the ejected passenger. On the contrary, the duty of exercising such care and provision is universally recognized. Thus, in the Kansas case above quoted, the court said: "Under these facts, the propriety of his removal cannot be doubted. The duty of the railroad company, however, with respect to Weber, did not end with his removal from the train. He was unconscious, and unable to take care of himself. The company could not leave him on the platform helpless, exposed, and without care or attention. It was its duty to exercise reasonable care and diligence to make temporary provision for his protection and comfort."

This was a case of intoxication. And in the case most relied on (Lemon v. Railroad Co.), the Supreme Court of the District of Columbia, after recognizing the right of removal, is careful to add: "Of course, for an abuse of this discretion, or for any oppression in its exercise, the company would be responsible." In another case the court, while conceding the right of ejection, said: "It does not follow that the right may be exercised in such manner, under such circumstances, or against a person in such mental or physical condition, as that death or serious bodily harm will necessarily, or even probably, result from putting him off." Railroad Co. v. Sullivan (Ky.), 16 Am. & Eng. R. R. Cas. 390. See, also, Hall v. Railroad Co. (S. C.), 5 S. E. Rep. 623; Lovett v. Railroad Co., 9 Allen, 557; Higgins v. Railroad Co., 46 N. Y. 23.

THE question as to the burden of proof where defendant sets up an *alibi* in criminal cases, arose in the case of State v. Child, 20 Pac. Rep. 275, decided by the Supreme Court of Kansas. There the lower court, in the trial of defendant for assault to kill, instructed the jury that, "as a matter of law, whenever a defendant relies on an *alibi* for his defense, the law casts upon him the burden of showing by a preponderance of the evidence that the *alibi* is true." The supreme court held this statement of law as totally erroneous, saying:

Whatever may be said as to the rule in other States, it can be very safely asserted that the person charged with the commission of a crime within this State is not required to prove his defense, or establish his innocence (and the expressions are synonymous, in the sense we use them), by a preponderance of the evidence. Our statute (section 228, Crim. Code) casts the burden of proof on the State. There is a presumption that clings to a person charged with crime, through every successive step of his trial, that he is innocent, and this presumption is never weakened, relaxed, or destroyed until there is a judgment of conviction. The State is required to prove this guilt beyond any reasonable doubt, and all the defendant has ever been required to do is to produce evidence that creates such a doubt as to entitle him to an acquittal. He is not required to prove his innocence; all that is demanded of him is to show such a state of facts as to create a reasonable doubt of his guilt. This defense of *alibi* is peculiar in this respect, so far as this case is concerned, that the State is bound to prove, in making its case, that the defendant was present at the commission of the crime, and this material fact it must prove beyond any reasonable doubt. The defendant alleges he was not present, and he offers evidence to sustain this allegation. The trial court said he must prove it by a preponderance of the evidence, while the general rule of law, outside of the statutory requirement, casts the burden of proving that fact on the State. The rule announced by the trial court does not apply in this State to insanity, and probably to any other (if we may use the term) affirmative defense to a criminal action. State v. Crawford, 11 Kan. 32.

THE somewhat anomalous condition of the law of Tennessee as to the right of specific performance of an oral contract for the sale of land is well illustrated in the case of Brakefield v. Anderson, 10 S. W. Rep. 363, decided by the supreme court of that State. This was a suit to enforce such performance upon the ground of possession and part payment. The courts of that State have always held, contrary to the English and most of the American courts, that part performance of a parol contract for the sale of land will not take it out of the statute of frauds. It is, however, held in this case that the statute is operative to defeat a verbal contract only when interposed by one of the parties; in other words, that such a contract is not void *ab initio*, but only voidable at the election of either party. The court admits that:

The decisions of this court have not been altogether harmonious upon this subject. In several of them such sales have been characterized as void (Pepkin v. James 1 Humph. 325; Crippen v. Bearden, 5 Humph. 130; Hurst v. Means, 2 Swan, 598; Sheid v. Stamps, 2 Sneed, 175); and in many others they have been held to be voidable merely (Sneed v. Bradley, 4 Sneed, 304; Hilton v. Duncan, 1 Cold. 320; Roberts v. Francis, 2 Heisk. 134; Hamilton v. Gilbert, *Id.* 681; Mason v. Swan, 6 Heisk. 455.) In some of these cases of the former class, no distinction was taken, or was necessary to be taken, between the terms "void" and "voidable." But the distinction suggested by the words themselves was expressly made in the cases of the latter class, wherein parole sales were held to be voidable only, and not void. * * * In the case at bar neither party relies upon the statute. On the contrary, the vendee comes with his bill, and seeks the execution of the contract; and the vendor not only does not interpose the defense to the vendee's action, but he brings his answer and cross-bill and affirmatively asks the court to enforce the contract in his behalf. Both parties come with appropriate pleadings and say they want their contract carried out. When this is done the reason of the statute—the danger of fraud and perjury—ceases, and the chancellor instead of setting the contract aside, should have decreed its specific execution.

THE question as to the effect of a discharge in insolvency by a State court was exhaustively considered by the Supreme Court of Oregon in the case of Main v. Messner 20 Pac. Rep. 255. There the question on the pleadings, exactly stated, was whether the discharge of defendant from his debts by the State courts of Oregon of which he was a citizen, was a bar to an action by plaintiff who was a citizen of another State and who was not a party to the insolvency proceedings. The court decided in the negative, and after reviewing Ogden v. Saunders 12 Wheat 213; Suydam v. Broadnox, 14 Pet. 75; Baldwin v. Hale 1 Wall. 232; Pratt v.

Chase 44 N. Y. 599; Hawley v. Hunt 27 Iowa 307; Bedell v. Scruton 54 Vt. 493; Hill v. Caulton 74 Me. 156; Rhodes v. Borden 67 Cal. 8; Beer v. Hooper 32 Miss. 246; Anderson v. Wheeler 25 Conn. 603; and Crow v. Coon 27 Mo. 512, says:

The fact is—and no principle is more elementary—that all State laws are confined in their operations to its territorial limits, and that it is not in the power of its legislature to give them any extraterritoral force and effect, and, as the authorities indicate, this is particularly true of State insolvent laws. Nor upon principle can it be otherwise. Under any insolvent system there must be some kind of judicial proceedings before any order or decree can be rendered discharging the insolvent from liability. That order or decree, to be valid and operative, must be supported by jurisdiction over the person or the thing; otherwise it is a mere nullity. As the debt attends the person, there can be no jurisdiction of it unless the non-resident creditor submits it to the court, and claims a dividend. If, then, the non-resident creditor does not voluntarily submit himself to the court in which the insolvency proceedings are pending, nor his claim for a dividend or distribution of the insolvent's estate, no order or decree of discharge which such court may render can extinguish his debt, or affect his right to its recovery. There being neither jurisdiction of him or his debt, the decree is a mere nullity, so far as it profess to discharge his debt. To hold otherwise would be to condemn him unheard, and to appropriate his property "without due process of law." This being so, the question in such cases—the discharge of the insolvent being otherwise valid—is simply one of jurisdiction, and the forum in which the remedy is sought cannot affect the principle or alter the rule. As the plaintiffs did not voluntarily submit themselves to the jurisdiction of the court in insolvency, or in any way participate in its proceedings, either by uniting in the application for the defendant's discharge, or by submitting their claim and accepting a dividend from his estate, it results that there was no jurisdiction over them, and that the debt which the defendant owed was not extinguished by his discharge in such insolvency proceedings, and consequently that the defendant cannot plead such discharge in bar of the plaintiff's right of recovery.

---

In the case of Pittsburg, etc., R. Co. v. Lyon, Supreme Court of Pennsylvania, 16 Atl. Rep. 607, it was decided that a rule, made by a railway company to sell tickets and deliver baggage at only one of its several stations in a city, which is less convenient for such passengers as desire to transfer baggage to another road, and to carry all baggage on to the main station though the trains regularly stop at the other stations to allow passengers to alight from or get on them, is, as a matter of law, unreasonable and void. Plaintiff had purchased a ticket from Washington, Pennsylvania, to New Orleans, *via* Pittsburg, and asked to stop and receive his baggage at Birmingham station, in Pittsburg, in order to make connection with the New Orleans train. This was refused and he sued the railroad company for damages, for the inconvenience resulting therefrom. The company set up in defense the rule above stated. The court in its decision says:

In view of the undisputed evidence of what occurred, the inconvenience, annoyance, and delay to which plaintiff below was arbitrarily and unnecessarily subjected, the learned president of the common pleas instructed the jury that the regulation in question was unreasonable and invalid. After reciting the facts, he said, among other things: "The question arises whether or not selling tickets to a certain point, or to the city of Pittsburgh, and allowing parties to get off at any of these stations under a ticket which would take them to the Union Depot station, they have a right to lay down a rule by which, although the party might get off himself, he would be compelled to go to the Union station for his baggage. I say such a rule is unreasonable, and one the company had no right to make, and therefere the existence of a rule of that kind, with reference to passengers, was a violation of their duty. While the inferior officers of the road may be justifiable in obeying the rule, yet it is such a rule that the company had no right to make, and they become responsible in damages if they undertake to enforce it as against passengers. I put it upon the broadest ground. But there is a narrower ground on which it might be put. It seems they did allow parties, not only to get off themselves,—because that is unquestioned,—but they did allow certain parties—commercial travelers, parties holding 1000-mile tickets, and on some other occasions other parties—to get off, and take their baggage off at that point. But it is immaterial whether or not the party is going by the Lake Erie road or going to Birmingham, or wherever he may go; it is a question of right, so far as the citizen is concerned," etc. It is contended that the above quoted instructions, and others of like import, were erroneous, in that they entirely withdrew from the consideration of the jury the reasonableness or unreasonableness of the regulation under consideration, and disposed of it as a question of law. While this position is not without the sanction of respectable authority, the better opinion appears to be that the question is generally a mixed one of law and fact. So far as the reasonableness of a given rule depends upon the existence of particular facts and circumstances, it is necessarily a question for the jury, under proper instructions from the court; but, if the facts are undisputed, the question is a proper one for the court. Railroad Co. v. Tripp, 17 N. E. Rep. 89, 33 Amer. & Eng. R. Cas. 488, 499, notes, and authorities there cited. As was said in Vedder v. Fellows, 20 N. Y. 126, 131: "There are strong reasons why the reasonableness of railroad regulations should be submitted to the court as a question of law, rather than to the jury as one of fact. Ordinarily, jurors are not aware, nor can they readily be made aware, of all the reasons calling for the rule. * * * What one jury might deem an inconvenient rule another might approve as judicious and proper. There would be no uniformity." The facts of the case at bar being indisputable, it was clearly the province of the court to say, as matter of law, whether the regulation in question was reasonable or not; and it was rightly held to be unreasonable, and invalid. It was of such an arbitrary and vexatious character that no tribunal, court, or jury could well declare it otherwise.

## WHAT RIGHTS HAS THE CHEROKEE NATION?

Under the heading "Rights of the Cherokee Nation," the CENTRAL LAW JOURNAL of February 10th[1] contained an article in defense of the rights of the Cherokees to the land known as the "Cherokee Strip," included within the proposed Territory of Oklahoma; and it is also stated editorially in the same issue of the JOURNAL[2] that it is shown that the proposition of the "Springer Bill," to appropriate these lands, "is in absolute violation of law and justice." I have been invited by the editor to present the other side of this proposition, "simply from a legal standpoint."

In the first place, it should be stated that on its face the Oklahoma bill provides the most ample protection for all rights which the Indians may have, and enacts that no person shall enter upon these lands until the consent of the Cherokees is first obtained by the government to the provisions of the bill and the fact proclaimed by the president. But it is contended on behalf of the Indians that while the bill, on its face, is fair enough to them in this regard, it is in reality but the beginning of measures designed to coerce their consent to the settlement of their lands; and as proof of this they cite the provision of section 13, declaring the grazing leases void. It becomes pertinent, therefore, to inquire by what title the Cherokees hold this "strip," and whether the United States has the legal right to declare these leases void.

The lands in question were acquired by the United States from France by the treaty of April 30, 1803. Prior to 1828 the Cherokees, in consideration of the cession of parts of their lands east of the Mississippi, had been given the right to occupy lands west of that river and partly within the then Territory of Arkansas, and by letters from the president and secretary of war, in 1818 and 1821, they had been promised lands for a permanent home in that locality and also an "outlet" from their homes to the hunting grounds of the far west. Accordingly, in 1828, a treaty was made between them and the United States, in which these facts are cited and the letters of the president and secretary of war are referred to, and in which is this agreement: "The United States agree to possess the Cherokee Nation and to guaranty it to them forever, and that guaranty is hereby solemnly pledged, of 7,000,000 acres of land, to be bounded as follows (describing it). In addition to the 7,000,000 acres thus provided for and bounded, the United States further guaranty to the Cherokee Nation a perpetual outlet west, and a free and unmolested use of all the country lying west of the western boundary of the above described limits, and as far west as the sovereignty of the United States and their right of soil extend."[3]

In 1830 congress passed the law known as the "act of May 28, 1830," which authorized the president to exchange lands lying west of the Mississippi to Indians for their lands east of that river, and if they prefer it, to guaranty "that the United States will cause a patent or grant to be made and executed to them for the same: *Provided*, always, that such lands shall revert to the United States if the Indians become extinct or abandon the same."[4] In 1833 and in 1835 the agreements to "possess" the Cherokees of the 7,000,000 acres and of the "outlet" were renewed, and the United States agreed that they, with another tract ceded by the treaty of 1835, "shall all be included in one patent, executed to the Cherokee Nation of Indians by the president of the United States, according to the provisions of the act of May 28, 1830."[5] And, accordingly, on December 1, 1838, a patent was issued to them for said lands, with the provision in regard to abandonment mentioned.

Now, then, if we stop here, what title have the Cherokees to this "outlet?" It is said that, by reason of the provision in the patent that the land shall revert in case of abandonment, it "is a base or determinable fee."[6] Kent defines such an estate to be[7] "an interest which may continue forever, but the estate is liable to be determined without the aid of a conveyance, by some act or event, circumscribing its continuance or extent."

The event here that is to circumscribe the estate is its abondonment. Has it been aban-

[1] 28 Cent. L. J. 162.
[2] *Ibid.* 153.
[3] 7 Stat. at Large, 311.
[4] 4 *Ibid.* 411.
[5] 7 Stat. at Large, 478, 414.
[6] United States v. Reese, 5 Dill. 405.
[7] 4 Kent, 9.

doned? It should be borne in mind that the interest granted is an "outlet," which, Webster says, is a "place or means by which anything is let out; exit." That is to say, they were granted nothing more than a right-of-way. That this was the intention and understanding of the parties is shown by the letter of John C. Calhoun, secretary of war, to the chiefs of the Arkansas Cherokees, of October 18, 1821, referred to in the treaty of 1828, when this "outlet" was first guaranteed to them, in which he says: "It is always to be understood that in removing the white settlers from Lovely's purchase, for the purpose of giving the *outlet* promised you to the west, you acquire thereby no rights to the soil, but merely to an outlet, of which you appear to be already apprised." It is manifest on the face of the treaties that it was never intended to give the Indians the same interest in the "outlet" as in the 7,000,000 acres. As Judge Brewer says: "Manifestly congress set apart that 7,000,000 acres as a home, * * * * because, as expressed in the preamble of the treaty, 'congress was intent upon securing a permanent home.' Beyond that the guaranty was of an outlet—not territory for residence, but for passage ground over which the Cherokees might pass to all the unoccupied domains west. But while the exclusive right to the outlet was guaranteed, while patent was issued conveying this outlet, it was described and intended obviously as an outlet, and not as a home."[8]

If this be true, whenever the Cherokees ceased to use it as an outlet—as a passageway to something beyond—there was an abandonment, for the purposes of the grant, and the estate reverted to the grantor, the United States. This is the well established principle of the law. In New York, where land was granted to a turnpike company for a road, in fee simple, the court say: "Such title must, nevertheless, be considered as vested only for the purposes of a road, and when the road is abandoned, the land reverts to the original owners."[9] So that, under this principle, even though the patent, on its face, had purported to grant the land in fee simple, without any condition, still the law would imply the condition, and, whenever the land ceased to be used for an outlet, it would revert. And, again, although the treaties and the patent should purport to grant these lands to the Cherokees in fee simple and for all purposes, such a grant must be taken in the light of existing laws and circumstances, and in view of these it is difficult to see how the Cherokees could claim a fee simple absolute, and, indeed, they do not seem to make any such claim, for they do not claim to have the right of alienation, which is inseparable from a title in fee simple absolute.[10] It has always been held, not only by the United States, but by every christian nation holding lands in the western hemisphere, inconsistent with the spirit of their institutions to recognize any other title in the Indian tribes than that of the right of possession. As Chief Justice Marshall said when this question first came before the supreme court: "The Indian inhabitants are to be considered merely as occupants, to be protected, indeed, while in peace, in the possession of their lands, but to be deemed incapable of transferring the absolute title to others."[11] As early as 1802 this principle was empodied in the legislation of the United States, in the following terms: "That no purchase, grant, lease or other conveyance of lands, or of any title or claim thereto, from any Indian or nation, or tribe of Indians, within the bounds of the United States, shall be of any validity, in law or equity, unless the same be made by treaty or convention, entered into pursuant to the constitution;" and all persons, except authorized agents of the United States, were forbidden to treat with the Indian tribes.[12] This law was in force when the Cherokees took these lands and it is still in force; its principle was based upon the well established policy of the government, and it must be considered as controling their title. As Attorney General Garland says in regard to this enactment: "This statutory provision is very general and comprehensive. Its operation does not depend upon the nature or extend of the title to the land which the tribe or nation may hold. Whether such title be fee simple or a right of occupancy

[8] United States v. Soule, 30 Fed. Rep. 918.

[9] Hook v. Turnpike Co., 12 Wend. 371; People v. White, 11 Barb. 26.

[10] 4 Kent, 5. "Every restraint upon alienation is inconsistent with the nature of a fee-simple."

[11] Johnson v. McIntosh, 8 Wheat. 591; Holden v. Joy, 17 Wall. 211.

[12] 2 Stat. at Large, p. 143, § 12; 4 *Ibid.* p. 730, § 12; Rev. Stat. 1873-4, p. 372, § 2116.

merely, is not material; in either case it applies."[13] And, as Judge Marshall said: "However this restriction may be opposed to natural right, and to the usages of civilized nations, yet, if it be indispensable to that system under which the country has been settled, and be adapted to the actual condition of the two people, it may, perhaps, be supported by reason, and certainly cannot be rejected by courts of justice."[14]

Clearly, then, the Indians would seem to have but a qualified title to any of their lands. To this "strip" the Cherokees have a qualified title for a specific use; that use having ceased, the title has reverted. It is true that this reversion can only be taken advantage of by the United States.[15] But the fact that the government, in an over-abundance of justice to the Cherokees, has not insisted upon the forfeiture and has even agreed, as it did in the treaty of 1866[16] and as the Oklahoma bill proposes to do, to pay them for these lands, should not be taken advantage of to prove title in the Cherokees. Indeed, the treaty of 1866 only recognizes a right of possession and jurisdiction in the Indians, which they are to retain only until the lands are sold and occupied by friendly Indians, as provided for in the treaty; and it is very questionable whether they have not parted with this right, for an agreed consideration, by the negotiations which have been had under this treaty. Into this question I cannot enter now. This much, however, is certain, they have no right to lease these lands without the consent of the government, and the leases made to the cattlemen are void. Congress is justified, therefore, in passing section 13 of the "Springer Bill," which provides as to these leases that they "are hereby declared void and contrary to public policy." Says Vattel: "The sovereign ought to neglect no means of rendering the land under his jurisdiction as well cultivated as possible. He ought not to allow either communities or private persons to acquire large tracts of land and leave them uncultivated."[17]

E. G. TAYLOR.

[13] Response of Attorney-General Garland to inquiries of Secretary Lamar, in regard to these lands, July 21, 1885.
[14] Johnson v. McIntosh, 8 Wheat. 591.
[15] Holden v. Joy, 17 Wall. 211.
[16] 14 Stat. at Large, 799.
[17] Vattel's Law of Nations, p. 34.

## THE ESSENTIALS OF AN AFFIDAVIT.

No other instrumentality in the administration of justice plays a more practical or important part than an affidavit.

Every provisional remedy, nearly every mesne process, and, step by step, throughout the entire progress of a cause, nearly all judicial action, and even the bill of costs under the final order of an appellate tribunal, is bottomed on an affidavit. And yet, out of the vast number of practicing lawyers with whom the preparation and use of an affidavit is a matter of almost daily necessity, very few trouble themselves to analyze closely the real structure of the instrument thus employed.

Five things, and but five, are vitally essential to the validity of an affidavit, in all judicial proceedings according to the course of the common law, namely, where, when, by whom, and before whom, was the instrument sworn to, and to what suit or judicial proceeding, if any, does it relate.

If the instrument shows these five ingredients, and each of them, it is what it purports to be—an affidavit—and may be judicially entertained as such, even though it may be defective in other particulars of secondary importance.

For example, an affidavit may be argumentative—the mere legal argument of the attorney reduced to writing and sworn to by the client, or it may be impertinent, or scandalous, or both, and yet may be an affidavit, and may be considered as such, for whatever it is worth to the court or officer by whom it is entertained. For these are defects going merely to the convenience of judges, or the private rights of litigating parties. But if the instrument purporting to be an affidavit lacks any one of the ingredients enumerated above, it is an absolute nullity and cannot be judicially entertained for any purpose whatever without doing violence to the honest administration of public justice.

To illustrate: First. Where was it sworn to? If perjury has been committed, this goes directly to the jurisdiction over the crime. If the venue is, "State of New York, ss. County of Blackacre," the matter does not concern the courts of Whiteacre, for the Blackacre grand jury has original and exclusive jurisdiction. It was upon this governing

principle that the Supreme Court of New York refused to entertain, as an affidavit, a paper purporting to have been sworn to before a commissioner of deeds of the city of Buffalo, but which had no *venue* showing the *county* in which the oath was administered.[1]

Second. When was it sworn to? If perjury has been committed, this gives directly to the question of time within which a prosecution therefor may be lawfully instituted.

Third. By whom was it sworn to? If perjury has been committed, this of course goes to the identity of the wrong-doer.

Fourth. Before whom was it sworn to? If perjury has been committed, this goes to the identity of the officer whose authority has been tampered with. Upon this governing principle courts refuse to entertain, as an affidavit, any paper from the *jurat* of which the words "before me" have been omitted.

In Queen v. Inhabitants, etc.,[2] Coleridge, J., says: "The defect is not a mere *irregularity* but affects the *jurisdiction*. The objection may seem of but little importance, but if ever we are to use strictness it should be on affidavits *and all that relates to their form*." This English case, after being closely followed in Smart v. Howe,[3] was wholly ignored, and its reasoning, on another point, was virtually repudiated by the Supreme Court of Michigan in two later cases.[4] A comparison of the last four cases cannot fail to interest the careful student of jurisprudence.

Lastly, and most important of all, to what suit or judicial proceedings, if any, does the instrument purporting to be an affidavit relate? This goes directly to the question of *materiality*, an essential ingredient in perjury, the most stealthy in its approaches, and malignant in its consequences, of all known offenses against the administration of justice. This is the governing principle upon which the Supreme Court of Michigan proceeded in deciding the case of Arnold v. Nye.[5] In that case, Thomas M. Cooley, who knows better now, and should have known better then, moved to dismiss a writ of error, basing his motion, in part at least, on papers purporting to be affidavits, but which were entitled merely Arnold v. Nye. The court, however, very properly declined to entertain, as affidavits, papers thus misentitled. The following cases, in addition to those already cited, illustrate almost every conceivable phase of the question under consideration.[6] From the foregoing authorities, we may fairly gather the general rule that in every jurisdiction, State or national, sound public policy requires an affidavit to contain each of the ingredients specified above, leaving nothing whatever to be inferred or presumed by the courts.

GEO. C. WORTH.

[1] Cook v. Staats, 18 Barb. 407.
[2] Queen v. Inhabitants of Bloxham, 51 E. C. L. 526.
[3] Smart v. Howe, 3 Mich. 590.
[4] King v. Harrington, 14 Mich. 532; *In re* Teachout, 15 Mich. 347.
[5] 11 Mich. 457.
[6] Whitney v. Warner, 2 Cow. 499; Humphrey v. Cande, 2 Cow. 507; Davis v. Rich, 2 How. Pr. 126; Greenvault v. F. M. Bank, 2 Doug. (Mich.) 498; Whipple v. Williams, 1 Mich. 115; Lane v. Morse, 6 How. Pr. 394; Sundland v. Adams, 2 How. Pr. 126.

---

## CONSTITUTIONAL LAW — DUE PROCESS OF LAW—PHYSICIANS—LICENSE.

### DENT V. STATE OF WEST VIRGINIA.

*United States Supreme Court, January 14, 1889.*

The act of West Virginia, requiring physicians to present their diplomas to the State board of health, or to stand an examination by the board, or to file an affidavit that they have practiced medicine in the State for ten years, and thereupon to receive a certificate, and imposing penalties on them for practicing medicine without such certificate, is constitutional.

This case comes from the Supreme Court of Appeals of West Virginia. It invoves the validity of the statute of that State which requires every practitioner of medicine in it to obtain a certificate from the State board of health that he is a graduate of a reputable medical college in the school of medicine to which he belongs; or that he has practiced medicine in the State continuously for the period of ten years prior to the 8th day of March, 1881; or that he has been found, upon examination by the board, to be qualified to prarctice medicine in all its departments; and makes the practice of, or the attempt by any person to practice, medicine, surgery, or obstetrics in the State without such certificate, unless called from another State to treat a particular case, a misdemeanor punishable by fine or imprisonment, or both, in the discretion of the court. The statute in question is found in sections 9 and 15 of an act of the State, ch. 93, passed March 15, 1882, amending a chapter of its Code concerning the public health. St. 1882, pp. 245, 246, 248.

Under this statute, the plaintiff in error was indicted in the State circuit court of Preston county, W. Va., for unlawfully engaging in the practice of medicine in that State in June, 1882, without a

diploma, certificate, or license therefor, as there required; not being a physician or surgeon called from another State to treat a particular case, or to perform a particular surgical operation. To this indictment the defendant pleaded not guilty, and, a jury having been called, the State by its prosecuting attorney, and the defendant by his attorney, agreed upon the following statement of facts, namely: "That the defendant was engaged in the practice of medicine in the town of Newburg, Preston county, W. Va., at the time charged in the indictment, and had been so engaged since the year 1876 continuously to the present time, and has during all said time enjoyed a lucrative practice, publicly professing to be a physician, prescribing for the sick, and appending to his name the letters, 'M. D.;' that he was not then and there a physician and surgeon called from another State to treat a particular case, or to perform a particular surgical operation, nor was he then and there a commissioned officer of the United States army and navy and hospital service; that he has no certificate, as required by section 9, ch. 93, Acts Leg. W. Va., passed March 15, 1882, but has a diploma from the 'American Medical Eclectic College of Cincinnati, Ohio;' that he presented said diploma to the members of the board of health who reside in his congressional district, and asked for the certificate as required by law, but they, after retaining said diploma for some time, returned it to defendant with their refusal to grant him a certificate asked, because, as they claimed, said college did not come under the word 'reputable,' as defined by said board of health; that if the defendant had been or should be prevented from practicing medicine it would be a great injury to him, as it would deprive him of his only means of supporting himself and family; that at the time of the passage of the act of 1882 he had not been practicing medicine ten years, but had only been practicing six, as aforesaid, from the year 1876." These were all the facts in the case. Upon them the jury found the defendant guilty, and thereupon he moved an arrest of judgment on the ground that the act of the legislature was unconstitutional and void so far as it interfered with his vested right in relation to the practide of medicine, which motion was overruled, and to the ruling an exception was taken. The court thereupon sentenced the defendant to pay a fine of $50 and the costs of the proceedings. The case being on writ of error to the supreme court of appeals of the State, the judgment was affirmed, and to review this judgment the case is brought here.

Mr. Justice FIELD, delivered the opinion of the court.

Whether the indictment upon which the plaintiff in error was tried and found guilty is open to objection for want of sufficient certainty in its averments is a question which does not appear to have been raised either on the trial or before the supreme court of the State. The presiding justice of the latter court, in its opinion, states that the counsel for the defendant expressly waived all objections to defects in form or substance of the indictment, and based his claim for a review of the judgment on the ground that the statute of West Virginia is unconstitutional and void. The unconstitutionality asserted consists in its alleged conflict with the clause of the fourteenth amendment which declares that no State shall deprive any person of life, liberty, or property without due process of law; the denial to the defendant of the right to practice his profession without the certificate required constituting the deprivation of his vested right and estate in his profession, which he had previously acquired.

It is undoubtedly the right of every citizen of the United States to follow any lawful calling, business, or profession he may chose, subject only to such restrictions as are imposed upon all persons of like age, sex, and condition. This right may in many respects be considered as a distinguishing feature of our republican institutions. Here all vocations are open to every one on like conditions. All may be pursued as sources of livelihood, some requiring years of study and great learning for their successful prosecution. The interest, or, as it is sometimes termed, the "estate," acquired in them—that is, the right to continue their prosecution—is often of great value to the possessors, and cannot be arbitrarily taken from them, any more than their real or personal property can be thus taken. But there is no arbitrary deprivation of such right where its exercise is not permitted because of a failure to comply with conditions imposed by the State for the protection of society. The power of the State to provide for the general welfare of its people authorizes it to prescribe all such regulations as in its judgment will secure or tend to secure them against the consequences of ignorance and incapacity, as well as of deception and fraud. As one means to this end it has been the practice of different States, from time immemorial, to exact in many pursuits a certain degree of skill and learning upon which the community may confidently rely; their possession be generally ascertained upon an examination of parties by competent persons, or inferred from a certificate to them in the form of a diploma or license from an institution established for instruction on the subjects, scientific and otherwise, with which such pursuits have to deal. The nature and extent of the qualifications required must depend primarily upon the judgment of the State as to their necessity. If they are appropriate to calling of profession, and attainable by reasonable study or application, no objection to their validity can be raised because of their stringency or difficulty. It is only when they have no relation to such calling or profession, or are unattainable by such reasonable study and application, that they can operate to deprive one of his right to pursue a lawful vocation.

Few professions require more careful preparation by one who seeks to enter it than that of medicine. It has to deal with all those subtle and

mysterious influences upon which health and life depend, and requires not only a knowledge of the properties of vegetables and mineral substances, but of the human body in all its complicated parts, and their relation to each other, as well as their influence upon the mind. The physician must be able to detect readily the presence of disease, and prescribe appropriate remedies for its removal. Every one may have occasion to consult him, but comparatively few can judge of the qualifications of learning and skill which he possesses. Reliance must be placed upon the assurance given by his license, issued by an authority competent to judge in that respect, that he possesses the requisite qualifications. Due consideration, therefore, for the protection of society may well induce the State to exclude from practice those who have not such a license, or who are found upon examination not to be fully qualified. The same reasons which control in imposing conditions, upon compliance with which the physician is allowed to practice in the first instance, may call for further conditions as new modes of treating disease are discovered, or a more thorough acquaintance is obtained of the remedial properties of vegetable and mineral substances, or a more accurate knowledge is acquired of the human system and of the agencies by which it is affected. It would not be deemed a matter for serious discussion that a knowledge of the new acquisitions of the profession, as it from time time advances in its attainments for the relief of the sick and suffering, should be required for continuance in its practice, but for the earnestness with which the plaintiff in error insists that by being compelled to obtain the certificate required, and prevented from continuing in his practice without it, he is deprived of his right and estate in his profession without due process of law. We perceive nothing in the statute which indicates an intention of the legislature to deprive one of any of his rights. No one has a right to practice medicine without having the necessary qualifications of learning and skill; and the statute only requires that whoever assumes, by offering to the community his services as a physician, that he possesses such learning and skill, shall present evidence of it by a certificate or license from a body designated by the State as competent to judge of his qualifications.

As we have said on more than one occasion, it may be difficult, if not impossible, to give to the terms "due process of law" a definition which will embrace every permissible exertion of power affecting private rights, and exclude such as are forbidben. They come to us from the law of England, from which country our jurisprudence is to a great extent derived; and there requirement was there designed to secure the subject against the arbitrary action of the crown, and place him under the protection of the law. They were deemed to be equivalent to "the law of the land." In this country the requirement is intended to have a similiar effect against legislative power; that is, to secure the citizen against any arbitrary deprivation of his rights, whether relating to his life, his liberty, or his property. Legislation must necessarily vary with the different objects upon which it is designed to operate. It is sufficient, for the purposes of this case, to say that legislation is not open to the charge of depriving one of his rights without due process of law, if it be general in its operation upon the subjects to which it relates, and is enforceable in the usual modes established in the administration of government with respect to kindred matters; that is, by process or proceedings adapted to the nature of the case. The great purpose of the requirement is to exclude everything that is arbitrary and capricious in legislation affecting the rights of the citizen. As said by this court in Yick Wo v. Hopkins, speaking by Mr. Justice Matthews: "When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power." 118 U. S. 356, 369, 6 S. C. Rep. 1064. See, also, Pennoyer v. Neff, 95 U. S. 714, 733; Davidson v. New Orleans, 96 U. S. 97, 104, 107; Hurtado v. California, 110 U. S. 516, 4 S. C. Rep. 111; Railroad Co. v. Humes, 115 U. S. 512, 519, 6 S. C. Rep. 110.

There is nothing of an arbitrary character in the provisions of the statute in question. It applies to all physicians, except those who may be called for a special case from another State. It imposes no conditions which cannot be readily met; and it is made enforceable in the mode usual in kindred matters—that is, by regular proceedings adapted to the case. It authorizes an examination of the applicant by the board of health as to his qualifications when he has no evidence of them in the diploma of a reputable medical college in the school of medicine to which he belongs, or has not practiced in the State a designated period before March, 1881. If, in the proceedings under the statute, there should be any unfair or unjust action on the part of the board in refusing him a certificate, we doubt not that a remedy would be found in the courts of the State. But no such imputation can be made, for the plaintiff in error did not submit himself to the examination of the board after it had decided that the diploma he presented was insufficient.

The cases of Cummings v. State of Missouri, 4 Wall. 277, and of *Ex parte* Garland, *Id.* 333, upon which much reliance is placed, do not, in our judgment, support the contention of the plaintiff in error. In the first of these cases it appeared that the constitution of Missouri, adopted in 1865, prescribed an oath to be taken by persons holding certain offices and trusts, and following certain pursuits within its limits. They were required to deny that they had done certain things, or had manifested by act or word certain desires or sympathies. The oath which they were to take em-

braced thirty distinct affirmations respecting their past conduct, extending even to their words, desires, and sympathies. Every person unable to take this oath was declared incapable of holding in the State "any office of honor, trust, or profit under its authority, or of being an officer, councilman, director, or trustee, or other manager of any corporation, public or private," then existing or thereafter established by its authority; or "of acting as a professor or teacher in any educational institution, or in any common or other school, or of holding any real estate or other property in trust for the use of any church, religious society, or congregation." And every person holding, at the time the constitution took effect, any of the offices, trusts, or positions mentioned, was required, within sixty days thereafter, to take the oath, and, if he failed to comply with this requirement, it was declared that his office, trust or position should, *ipso facto*, become vacant. No person, after the expiration of the sixty days, was allowed, without taking the oath, "to practice as an attorney or counselor at law," nor after that period could "any person be competent as a bishop, priest, deacon, minister, elder or other clergyman, of any religious persuasion, sect, or denomination to teach or preach, or solemnize marriages." Fine and imprisonment were prescribed as a punishment for holding or exercising any of the "offices, positions, trusts, professions, or functions" specified, without taking the oath, and false swearing or affirmation in taking it was declared to be perjury, punishable by imprisonment in the penitentiary. A priest of the Roman Catholic Church was indicted in a circuit court of Missouri, and convicted of the crime of teaching and preaching as a priest and minister of that religious denomination without having first taken the oath, and was sentenced to pay a fine of $500, and to be committed to jail until the same was paid. On appeal to the supreme court of the State the judgment was affirmed, and the case was brought on error to this court. As many of the acts from which the parties were obliged to purge themselves by the oath had no relation to their fitness for the pursuits and professions designated, the court held that the oath was not required as a means of ascertaining whether the parties were qualified for those pursuits and professions, but was exacted because it was thought that the acts deserved punishment, and that for many of them there was no way of inflicting punishment except by depriving the parties of their offices and trusts. A large portion of the people of Missouri were unable to take the oath, and as to them the court held that the requirement of its constitution amounted to legislative deprivation of their rights. Many of the acts which parties were bound to deny that they had ever done were innocent at the time they were committed, and the deprivation of a right to continue in their offices if the oath were not taken was held to be a penalty for a past act, which was violative of the constitution. The doctrine of this case was affirmed in Pierce v. Carskadon, 16 Wall. 234.

In the second case mentioned—that of *Ex parte* Garland—it appeared that on the 2d of July, 1862, congress had passed an act prescribing an oath to be taken by every person elected or appointed to any office of honor or profit under the United States, either in the civil, military, or naval departments of the government, except the president, before entering upon the duties of his office, and before being entitled to his salary or other emoluments. On the 24th of January, 1865, congress, by a supplemental act, extended its provisions so as to embrace attorneys and counselors of the courts of the United States. This latter act, among other things, provided that after its passage no person should be admitted as an attorney and counselor to the bar of the supreme court, and, after the 4th of March, 1865, to the bar of any circuit or district court of the United States, or of the court of claims, or be allowed to appear and be heard by virtue of any previous admission, until he had taken and subscribed the oath prescribed by the act of July 2, 1862. The oath related to past acts, and its object was to exclude from practice in the courts parties who were unable to affirm that they had not done the acts specified; and, as it could not be taken by large classes of persons, it was held to operate against them as a legislative decree of perpetual exclusion. Mr. Garland had been admitted to the bar of the Supreme Court of the United States, previous to the passage of the act. He was a citizen of Arkansas, and when that State passed an ordinance of secession which purported to withdraw her from the Union, and by another ordinance attached herself to the so-called "Confederate States," he followed the State, and was one of her reprepentatives, first in the lower house, and afterwards in the senate of the congress Confederacy, and was a member of that senate at the time of the surrender of the Confederate forces to the armies of the United States. Subsequently, in 1865, he received from the president of the United States a full pardon for all offenses committed by his participation, direct or implied, in the rebellion. He produced his pardon, and asked permission to continue as an attorney and counselor of this court without taking the oath required by the act of January 24, 1865, and the rule of the court which had adopted the clause requiring its administration in conformity with the act of congress. The court held that the law, in exacting the oath as to his past conduct as a condition of his continuing in the practice of his profession, imposed a penalty for a past act, and in that respect was subject to the same objection as that made to the clauses of the constitution of Missouri, and was therefore invalid.

There is nothing in these decisions which supports the positions for which the plaintiff in error contends. They only determine that one who is in the enjoyment of a right to preach and teach the Christian religion as a priest of a regular

church, and one who has been admitted to practice the profession of the law, cannot be deprived of the right to continue in the exercise of their respective professions, by the exaction from them of an oath as to their past conduct, respecting matters which have no connection with such professions. Between this doctrine and that for which the plaintiff in error contends there is no analogy or resemblance. The constitution of Missouri and the act of congress in question in those cases were designed to deprive parties of their right to continue in their professions for past acts, or past expressions of desires and sympathies, many of which had no bearing upon their fitness to continue in their professions. The law of West Virginia was intended to secure such skill and learning in the profession of medicine that the community might trust with confidence those receiving a license under authority of the State. Judgment affirmed.

NOTE. — *Due Process of Law.* — The fourteenth amendment to the United States constitution declares that no State shall deprive any person of life, liberty or property without due process of law. It is as difficult as it is unwise to attempt any exact definition of due process of law.[1] "Due process of law in each particular case means such an exertion of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs."[2] Such regulations, as the legislature may deem fit to establish, do not by virtue of such legislation become due process of law.[3] The term, as applied to judicial proceedings, means a course of legal proceedings according to the rules and principles which have been established by our jurisprudence for the protection and enforcement of private rights. Accordingly, a judgment in a personal action, obtained on service of summons by publication against a non-resident, under a State statute, was declared to be void.[4] A party must be properly brought into court, and when there have an opportunity to prove any fact, which according to the constitution and usages of the common law would be a protection to him or his property.[5] Valid assessments of taxes to the true owner of the property, and notice to him of the judgment to be rendered against him, are indispensable.[6] A legislature cannot dispense with personal service of notice of suit, where it is practicable and has been usual under the general law.[7] A party must have notice of proceedings to condemn his property, and an opportunity for the correction of errors must be given.[7] A sale of property under a distress warrant, issued by the solicitor of the treasury, under a certificate from the treasury officers, of the balance found due from a collector of customs, in accordance with an act of congress, was held valid, since it was in harmony with the practice prevailing in England for centuries.[9]

1 Berthoff v. O'Rielly, 74 N. Y. 509.
2 Cooley Const. Lim. 356.
3 Westervelt v. Gregg, 12 N. Y. 209.
4 Pennoyer v. Neff, 95 U. S. 714.
5 People v. Essex Co., 70 N. Y. 228.
6 Abbott v. Lindenbower, 42 Mo. 162.
7 Brown v. Bd. Commrs., 50 Miss. 468.
8 Garvin v. Dausman, 27 Cent. L. J. 312.
9 Murray v. Hoboken, 18 How. 272.

A legal process, originally founded in necessity, which has been consecrated by time and approved and acquiesced in by universal consent, is held to be due process of law.[10] Where the laws of a State impose a tax or other burden on property for public use, and a mode is provided for contesting the charge in the ordinary courts of law, there is no lack of due process of law. The determination of due process of law must be left to be decided by the gradual process of judicial inclusion and exclusion, as the cases presented for judicial decision shall require.[11] It is not necessary that such laws shall apply to all persons, but it is only necessary that all persons brought under subjection to the statutes shall be treated alike,[12] but the law must not be aimed at one class of the people.[13]

*Police Power of the States.*—The police power of a State extends to the protection of the lives, limbs, health, comfort and quiet of all persons, and the protection of all property in the State.[14] Private interests must be made subservient to the general interests of the community, which is accomplished by the police power.[15] The legislature is generally the exclusive judge of what is or is not hurtful, the only limitations being those prescribed in the constitution.[16] But under pretense of exercising the police power, the legislature cannot enact laws not necessary to the preservation of the health and safety of the community, that will be oppressive and burdensome to the citizen. What are reasonable regulations and what are subjects of police power, must necessarily be judicial questions.[17] In the exercise of its police powers a State may pass laws which incidentally affect commerce between the States.[18] A State law excluding lewd or debauched women from the State is valid.[19]

*Licenses under Police Power.*—The right to pursue any lawful calling is subject to such restrictions as the legislature may lawfully prescribe to protect public health.[20] A State can require dentists to be examined and licensed before they can pursue their vocation,[21] and also locomotive engineers, theugh such engineers are in charge of trains which pass into other States.[22] Owing to the numerous cases on the subject, in addition to the principal case, the right of a State to require a physician to obtain a license before practicing his profession will probably be never again questioned.[23]

S. S. MERRILL.

10 State v. Allen, 2 McCord, 55.
11 Davidson v. New Orleans, 96 U. S. 97.
12 Mo. Pac. R. Co. v. Mackey, 127 U. S. 205; Mo. Pac. R. Co. v. Humes, 115 U. S. 512; Minneapolis, etc. R. Co. v. Beckwith, 9 S. C. Rep. 207.
13 Ho Ah Kow v. Nunan, 18 Am. L. Reg. 676.
14 Thorpe v. Rutland, etc. R. Co., 27 Vt. 140; Munn v. Illinois, 94 U. S. 147; Beer Co. v. Massachusetts, 97 U. S. 25.
15 Slaughter House Cases, 83 U. S. 36.
16 *Ex parte* Shrader, 33 Cal. 279.
17 Toledo, etc. R. Co. v. Jacksonville, 67 Ill. 37.
18 Robbins v. Shelby Co. Tax Dist., 120 U. S. 489.
19 *Ex parte* Ah Fook, 49 Cal. 402.
20 *Ex parte* Spinney, 10 Nev. 323.
21 Wilkins v. State, 113 Ind. 514.
22 Smith v. Alabama, 124 U. S. 465; Nashville v. Alabama, 9 S. C. Rep. 28.
23 *Ex parte* Spinney, *supra;* Eastman v. State, 109 Ind. 278; State v. State Med. Board, 32 Minn. 324; Logan v. State, 5 Tex. App. 306; Hewett v. Charier, 16 Pick. 353; Fox v. Territory, 2 Wash. Ter. 297; State v. Dent, 25 W. Va. 1; Finch v. Gridley, 25 Wend. 469; West v. Clutter, 37 Ohio St. 347; Bibber v. Simpson, 50 Me. 181; State v. Gregory, 83 Mo. 123; Brown v. People (Colo.), 17 Pac. Rep. 404.

## RECENT PUBLICATIONS.

BLICKENSDERFER'S BLACKSTONE'S ELEMENTS OF LAW, ETC., with Analytical Charts, Tables and Legal Definitions, Arranged and Displayed by a Systematic and Attractive Method. By U. Blickensderfer, Attorney at Law, Author of "Abridgment of Elementary Law," "Law Student's Review," "Descent of the Crown of England," etc. Chicago, Ill.: Ulric Blickensderfer, Publisher. 1889.

This book is certainly novel and ingenious, and bears the marks of great labor on the part of the author. The design is, as stated by him, "to present an old and important subject in a new and attractive form." The subject might have been as appropriately and more succinctly stated "Blackstone boiled down." It is, in effect, the principles of the law, as stated by Blackstone, grouped into short distinct paragraphs, preserving as far as possible the language of the original text. Accompaning it are charts containing the heads, divisions and subheads of the law as Blackstone stated them. We can see wherein the work may be of interest and value to the student of law, and doubtless it is that class the author intended to reach, but one cannot help regretting that the same amount of ingenuity, labor and ability could not have been expended in a direction that would more directly and substantially benefit the practitioner. One feature of this book we cannot but commend—its mechanical execution—and that the more heartily because the author seems to have been his own publisher.

### BOOKS RECEIVED.

THE POWERS AND DUTIES OF POLICE OFFICERS AND CORONERS. By R. H. Vickers, of the Chicago Bar. Chicago: T. H. Flood & Co. 1889.

THE POWER TO SELL LAND FOR THE NON-PAYMENT OF TAXES. By Robert S. Blackwell. Fifth Edition. Revised and Enlarged by Frank Parsons. Two Volumes. Boston: Little, Brown & Co. 1889.

GENERAL DIGEST OF THE DECISIONS OF THE PRINCIPAL COURTS IN THE UNITED STATES. Published During the Year Ending September, 1888. Volume III. Rochester: Lawyers Co-Operative Publishing Co. 1888.

THE LAW OF EXECUTORS AND ADMINISTRATORS. By James Schouler. Second Edition. Boston: Charles C. Soule. 1889.

THE LAW OF AGENCY, Including Special Chapters on Attorneys, Auctioneers, Brokers and Factors. By Floyd R. Mechem. Chicago: Callaghan & Co. 1889.

A MANUAL OF CRIMINAL LAW, as Established in the State of Maryland. By Louis Hochheimer, of the Baltimore Bar. Baltimore: Harold B. Scrimger. 1889.

REPORTS OF CASES ADJUDGED AND DETERMINED IN THE COURT OF CHANCERY OF THE STATE OF NEW YORK. Complete Edition. Copiously Annotated by Embodying all Equity Jurisprudence, with Table of Cases Cited. By Robert Desty. Book IV. Containing Paige's Chancery Reports, Vols. 7, 8, 9, 10. Rochester: The Lawyers Co-Operative Publishing Co. 1888.

---

*[Subscribers are invited to send short answers to the following.]*

## QUERIES AND ANSWERS.

### QUERY NO. 15.

A private corporation owned, used and maintained a powder magazine, keeping stored therein large quantities of powder. As a matter of fact the magazine was located so near to numerous inhabitated dwelling houses that the natural and probable result of an explosion would be to damage or destroy them. Powder magazine was struck by lightning, causing it to explode, damaging dwelling house of plaintiff. Is corporation liable, under the common law? B.

### QUERIES ANSWERED.

#### QUERY NO. 11.

*[To be found in Vol. 28, Cent. L. J. p. 219.]*

The heirs have an interest the same as their father would have had if living, viz: the same as the other children (Kent's Commentaries, Vol. 4, *p. 391; 78 Mo. 55), and can, of course, maintain a partition suit. The quitclaim conveyed nothing, as at time same was made grantor had no title, and an after-acquired title does not inure to the benefit of grantee in a quitclaim deed. 88 Mo. 475. "His share of farm" is mere surplusage. Leaving out said clause the law would give each child his share. Said clause would not deprive any of the heirs of their rights as given by law, as an heir cannot be disinherited without an express devise or necessary implication. Jarmin on Wills, 532. There is none here to divest the heirs of deceased. H. C. F.

#### QUERY NO. 14.

*[To be found in Vol. 28, Cent. L. J., p. 242.]*

1. The child inherits the fee, subject to his mother's right to co-enjoy the homestead during her life. She cannot, by any act, impair his title or his right of possession. It may be sold to pay debts of his deceased father, subject to his right of possession during minority. By removing from and attempting to convey the land, the widow forfeited her homestead, and the title vested in the child during his minority, and, if not sold to pay debts, in fee. Rohrer v. Brockhage, 86 Mo. 544; Kaes v. Gross, 92 Mo. 647. 2. Notwithstanding the conveyance and removal, the child is entitled to the exclusive possession of the land as against his mother's vendee. Roberts v. Ware, 80 Mo. 363; Kochling v. Daniel, 82 Mo. 54. 3. And may maintain ejectment. Kochling v. Daniel, 82 Mo. 54; Rogers v. Mayes, 84 Mo. 529. The conclusion would seem to be that neither title nor right of possession pass by the deed. E. H.

---

## JETSAM AND FLOTSAM.

JUDGE — Prisoner, the evidence shows that you brutally assaulted the plaintiff. Have you anything to offer in extenuation? Prisoner—No, Sir; my lawyer took all the money I had.

THE COURT—How is this, Mr. Johnson? The last time you were here you consented to be sworn, and now you simply make affirmation. Mr. Johnson—Well, yo' honah, de reason am dat I 'spects I ain't quite so suah about de facts ob dis case as de odder.

"PRISONER," said the Judge, "have you anything to say before the sentence of the court is passed upon you?"

"I have, your Honor." (Turning to his lawyer.) "You slick-fingered, smooth-jawed puddin'-head! You billy-be-dad-slammed hunk of soap fat! You said you could clear me for $25, and took your money in advance. You hain't got sense enough to be assistant janitor to a corn-crib, you don't know as much law as a Texas horned frog, and you haven't the moral principle of a blind owl! Go ahead, Judge."

## WEEKLY DIGEST

**Of all the Current Opinions of all the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.**



1. ABDUCTION—Indictment— Intent. —— Under Rev. St. Ind. § 1915, an indictment failing to allege that the abduction was with the intent of having such person carried away from his residence is bad.—*State v. Sutton*, S. C. Ind., Jan. 12, 1889; 19 N. E. Rep. 602.

2. ADMIRALTY — Cause of Loss. —— Where a vessel was negligently run ashore, and a storm coming on, was voluntarily scuttled to save her from total loss: *Held*, that the stranding, and not the storm, were the proximate cause of the loss. — *Park v. The Baxter*, U. S. D. C. (N. Y.), Nov. 30, 1888; 37 Fed. Rep. 219.

3. ADMIRALTY—Collision.—— Question of negligence in overtaking and passing vessel. — *Milliken v. The Northam*, U. S. D. C. (N. Y.), Jan. 9, 1889; 37 Fed. Rep. 238.

4. ADMIRALTY—Jurisdiction—Contract with Stevedore. ——A claim for services rendered by a stevedore in loading or unloading a vessel is a maritime contract, within the principles of admiralty jurisdiction.—*Mygatt v. The Gilbert Knapp*, U. S. D. C. (Wis.), Jan. 7, 1889; 37 Fed. Rep. 209.

5. ADVERSE POSSESSION—Good Faith—Prescription of Ten Years.—— Good faith and possession are not sufficient to acquire immovable property by the prescription of 10 years. — *Beer v. Leonard*, S. C. La., Dec. 5, 1888; 5 South. Rep. 257.

6. AFFIDAVIT — Acknowledged Before Plaintiff's Attorney. —— It is not error to refuse to strike out an affidavit of plaintiff's inability to give security for costs, on the ground that it was acknowledged before plaintiff's attorney as notary. — *Ryburn v. Moore*, S. C. Tex., Nov. 23, 1888; 10 S. W. Rep. 393.

7. APPEAL—Review on Second Appeal.——Questions which were open to dispute, and were either expressly or by implication decided on a first appeal, are not open for review on a second appeal, but only so much of the proceedings as have taken place after the order remanding the cause.—*McKinney v. State*, S. C. Ind., Jan. 23, 1889; 19 N. E. Rep. 613.

8. ANIMALS—Running at Large. —— Construction of Code Ga. § 1455, as to time when law goes into effect. — *Holliman v. Kingery*, S. C. Ga., Jan. 16, 1889; 8 S. E. Rep. 535.

9. ARREST — Joint Tort-feasors. —— Where several are engaged in making a lawful arrest, one is not liable for the unlawful act of another, done without his concurrence, though in furtherance of the common purpose.— *Wert v. Potts*, S. C. Iowa, Jan. 23, 1889; 41 N. W. Rep. 375.

10. BRIDGES—Defects—Action. —— Under Code Ga. § 690, any personal damage by reason of defects in the bridge may bring an action either against contractor or county.—*Arnold v. Henry Co.*, S. C. Ga., Jan. 9, 1889; 8 S. E. Rep. 606.

11. CARRIERS—Of Freight — Discrimination. —— Discriminations by railroad companies in freight rates, based solely on the amount of freights shipped, are unwarrantable. — *Kinsley v. Buffalo, N. Y. & P. R. Co.*, U. S. C. C. (Penn.), Nov. 20, 1888; 37 Fed. Rep. 181.

12. CARRIERS OF GOODS—Delivery.——Under Rev. St. Tex. arts. 281, 282, a railroad company is liable as a carrier for goods not discharged from its car though a third person has agreed with the consignee to unload them. — *Mo. Pac. Ry. Co. v. Haynes*, S. C. Tex., Nov. 30, 1888; 10 S. W. Rep. 398.

13. CONFLICT OF LAWS — Distribution of Property — Domicile of Decedent. —— The laws of the State in which the domicile of a decedent is at the time of his death control and govern the distribution of his personal estate, although he may die in another State. — *White v. Tennant*, W. Va. Ct. App., Dec. 1, 1888; 8 S. E. Rep. 596.

14. CONSTITUTIONAL LAW— Drummer's Tax — District of Columbia.——Act Cong. Feb. 21, 1871, (16 St. p. 419, § 1,) confers upon the District of Columbia only municipal powers, and does not authorize it to impose a license upon persons soliciting the sale of goods on behalf of individuals or firms doing business outside of the district.— *Stoutenburgh, Intendant of Washington Asylum v. Hennick*, Jan. 14, 1889; 9 S. C. Rep. 256.

15. CONSTITUTIONAL LAW — Unwise Legislation. —— That an act is unwise is no reason for declaring it void. — *Demoval v. Davidson Co.*, S. C. Tenn., Jan. 17, 1889; 10 S. W. Rep. 333.

16. CONTRACT—Construction—Certainty.——In a contract for the sale of an undivided interest in a mine: *Held*, that under the stipulations appearing in contract, that the sum promised to be paid was certain.— *Bates v. Childers*, S. C. N. Mex., Jan. 18, 1889; 20 Pac. Rep. 164.

17. CONTRACTS—Interpretation.——Where a purchaser agrees to pay the full cost of the labor, tools, and materials used in cutting, dressing, and boxing granite, and "insurance on the same," he is not liable for insurance, where none was ever taken out by the seller. — *Tillson v. United States*, Jan. 14, 1889; 9 S. C. Rep. 255.

18. CONTRACT — Right to Purchase. —— A party purchasing may contract, before his purchase, to sell and that contract may be enforced. — *United States v. Trinidad Co.*, U. S. C. C. (Colo.), Jan. 10, 1889; 37 Fed. Rep. 180.

19. CONTRACTS — Waiver of Terms. —— In a contract for the construction of a house, it was stipulated that no charge should be made for extra work, unless the same should be ordered in writing: *Held*, that evidence that the owner had orally requested the performance of certain work might be held a waiver of the stipulation.—*Bartlett v. Stanchfield*, S. J. C. Mass., Jan. 5, 1889; 19 N. E. Rep. 549.

20. CORPORATIONS — Suit by Stockholder. —— Facts which stockholder must show to entitle him to bring suit in behalf of the corporation. — *Rathbone v. Parkersburg Co.*, W. Va. Ct. App., Dec. 1, 1888; 8 S. E. Rep. 570.

21. COSTS.——Construction of Act Tenn. 1829, § 3922 as

to right of plaintiff to costs. — *Stefner v. Burton*, S. C. Tenn., Nov. 12, 1888; 10 S. W. Rep. 358.

22. COUNTIES—County Commissioners. —— Term of office under Laws Ind. March 7, 1885, providing for the term of county commissioners, respondent was entitled to serve the regular period of three years from the time of commencing service, and as this carried him to a point where there was a fraction of a term he was entitled to serve to the end of such current regular term.— *State v. Clendenning*, S. C. Ind., Jan. 25, 1889; 19 N. E. Rep. 623.

23. COURTS—District Courts—Jurisdiction — Foreclosure of Tax Liens.— Under ch. 39, Laws 1877, no extraordinary power or jurisdiction is conferred upon district courts, but only an additional remedy or cause of action is thereby given to a county by which it may, under certain conditions, foreclose a tax lien. — *English v. Woodman*, S. C. Kan., Dec. 8, 1888; 20 Pac. Rep. 262.

24. COURTS—Federal Courts— Injunction. —— *Held*, under facts that the circuit court would not restrain the right to extend one railroad across another.— *U. P. Rwy. Co. v. Denver R. R.*, U. S. D. C. (Colo.), Jan. 5, 1889; 37 Fed. Rep. 179.

25. COURTS — Federal Jurisdiction — Following State Practice—— The courts of the United States sitting in equity may administer equitable rights peculiar to the laws of a State where the courts are held. — *Fechheimer v. Baum*, U. S. C. C. (Ga.), San. 3, 1889; 37 Fed. Rep. 167.

26. CRIMINAL LAW—Charge of Judge.— Under Const. S. C. art. 4, § 26, a judge cannot in his charge to the jury give his opinion of the testimony.— *State v. Caddon*, S. C. S. Car., Jan. 3, 1889; 8 S. E. Rep. 536.

27. CRIMINAL LAW—Continuance— Absent Witnesses—Affidavit. —— Where an affidavit for a continuance, made by a defendant in a criminal case, sets out evidence which, if proved, would entitle the defendant to an acquittal, the court cannot refuse the continuance because of disbelief in the statements of the affidavit.— *Baker v. Commonwealth*, Ky. Ct. App., Jan. 24, 1889; 10 S. W. Rep. 386.

28. CRIMINAL LAW—Indictment.——*Held*, that the indictment though informal in some respects, stated an offense advised defendant of what he was to meet and was substantially sufficient.—*State v. Palmer*, S. C. Kan., Jan. 5, 1889; 20 Pac. Rep. 270.

29. COVENANTS—Damages— Evidence. —— Covenant for damages for breach of contract for the exchange of land: *Held*, under facts that tax-bills were no evidence of value of land.—*Kennershotz v. Gallagher*, S. C. Pa., Jan. 28, 1889; 16 Atl. Rep. 518.

30. DAMAGES—Negligence.——Sufficiency of instructions as to want of ordinary care upon question of exemplary damages. — *Mo. Pac. Ry. Co. v. Shuford*, S. C. Tex., Nov. 30, 1888; 10 S. W. Rep. 408.

31. DAMAGES—Personal Injuries — Excessive. —— In an action for personal injuries to wife: *Held*, under facts that a verdict for $5,000 was not excessive. — *Mo. Pac. R. R. v. Mitchell*, S. C. Tex., Nov. 30, 1888; 10 S. W. Rep. 411.

32. DEED — Consideration. —— A conveyance to the widow of the grantor's deceased son, of property left by the son, is based upon a consideration of love and affection, which will support it as between the parties. —*Beith v. Beith*, S. C. Iowa, Jan. 22, 1889; 41 N. W. Rep. 371.

33. DEPOSITIONS—Appeal.——Gen. St. Ky. ch. 113, § 31, with reference to depositions of attesting witnesses of a will does not apply to proceedings in the circuit court on appeal from the county court in probate proceedings.— *Moore v. Smith*, Ky. Ct. App., Jan. 19, 1889; 10 S. W. Rep. 380.

34. EJECTMENT—Improvements — Evidence of Value. —— Construction of Code Va., 1873, ch. 132, allowing defendant in ejectment to recover the value of improvements not exceeding the amount to which the value of the premises is increased by them, etc. — *Hollingsworth v. Funkhauser*, S. C. Va., Nov. 8, 1888; 8 S. E. Rep. 592.

35. ELECTIONS AND VOTERS — Counting Ballots. —— Construction of U. S. Rev. Stat. § 5515, providing punishment for election officers failing to properly count ballots. — *United States v. Badinelli*, U. S. C. C. (Tenn.), Dec. 20, 1888; 37 Fed. Rep. 144.

36. ELECTIONS AND VOTERS — Failure to Give Notice. ——If an election is held to fill a vacancy for the office of a justice of the peace at any other election than at the regular city election, and no official proclamation or public notice is given of the election: *Held*, that the omission to give any public notice of the election to fill the vacancy, and the failure of the electors to participate generally in the election, vitiates the same.— *Cook v. Mock*, S. C. Kan., Jan. 5, 1889; 20 Pac. Rep. 259.

37. EQUITY—Rescission of Contract — Evidence. —— In an action to rescind a purchase of land the price paid by defendant is not evidence of value. — *Hunter v. Owen*, Ky. Ct. App., Jan. 19, 1889; 10 S. W. Rep. 376.

38. ESTOPPEL—In Pais.—— An estoppel *in pais* arises where one is prejudiced by the wilful act or declaration of another, upon whose conduct the former has rightfully acted.— *Ensel v. Levy*, S. C. Ohio., Jan. 29, 1889; 19 N. E. Rep. 597.

39. EVIDENCE — Value of Land. —— Whether person offered as a witness is qualified to give opinion upon the value of land is largely a matter of judicial discretion.— *Phillips v. Town of Marblehead*, S. J. C. Mass., Jan. 4, 1889; 19 N. E. Rep. 547.

40. EXECUTORS AND ADMINISTRATORS — Defect in Parties.—— In an action by less than all the executors of a will, defendant cannot take advantage of the non-joinder of the other or others by a motion to amend the record, after having pleaded the general issue. — *Conrow v. Conrow*, S. C. Penn., Jan. 28, 1889; 16 Atl. Rep. 522.

41. EXECUTORS AND ADMINISTRATORS — Payment of Debts. —— Sale of lands of decedent to pay his debts should not be decreed without allowing his heirs a reasonable time to pay them. — *Hart v. Hart*, W. Va. Ct. App., Dec. 14, 1888; 8 S. E. Rep. 562.

42. EXECUTORS AND ADMINISTRATORS—Proof of Claims. ——Construction of Rev. St. Tex. arts. 2276, 2036, 2275, as to presentment of claims against the estate of deceased. —*Jenkins v. Cain*, S. C. Tex., Nov. 23, 1888; 10 S. W. Rep. 391.

43. EXECUTORS AND ADMINISTRATORS — Sale of Decedent's Real Estate. —— Under Code Tenn. § 3105, 3106, the county court has jurisdiction of a bill for the sale of a decedent's realty for payment of debts when personal estate is insufficient.—*Davis v. Davis*, S. C. Tenn., Jan. 8, 1889; 10 S. W. Rep. 363.

44. EXECUTORS AND ADMINISTRATORS— Set-off by Tenants. —— Upon a contract for a lease of a farm, made by the lessor in his life-time, the rent accruing from such lease, after the death of the lessor, cannot be set-off by a debt due to the tenant from the lessor at the time of his death, although the estate of the lessor is insolvent. — *Washington v. Castleman*, W. Va. Ct. App., Dec. 8, 1888; 8 S. E. Rep. 603.

45. GARNISHMENT— Property Subject to Process—Subscription to Capital Stock. —— A balance due on a subscription to the capital stock of a corporation, to be paid when calls should be made therefor, is not liable to garnishment on a claim against the corporation when no call has been made. — *Teague v. LeGrand*, S. C. Ala., Jan. 10, 1889; 5 South. Rep. 287.

46. HOMICIDE — Murder in First Degree. —— An instruction that an intentional killing was murder in the first degree, without any qualifications as to malice or deliberation, is erroneous. — *State v. Herrell*, S. C. Mo., Feb. 4, 1889; 10 S. W. Rep. 387.

47. HUSBAND AND WIFE — Community Property. —— *Held*, under the evidence that the land in controversy was community property, no intention of the husband

to make wife a gift of the same being apparent. — *Morgan v. Lones*, S. C. Cal., Dec. 31, 1888; 20 Pac. Rep. 248.

48. HUSBAND AND WIFE—Execution—Interest of Wife. ——When land in which the wife of the mortgagor has an inchoate marital interest is sold under a foreclosure judgment, and the land is afterwards redeemed by a judgment creditor, and sold under his judgment, by virtue of Rev. St. Ind. § 773, the wife is barred thereby, and acquires no interest, notwithstanding § 2508. — *Patterson v. Rosenthal*, S. C. Ind., Jan. 24, 1889; 19 N. E. Rep. 618.

49. HUSBAND AND WIFE—Loan to Wife.——A husband sued his wife, the complaint alleging an indebtedness for money loaned to her, which she expressly promised to pay; that the money was necessary in her separate business, and was obtained to prevent suits being brought against her: *Held*, under Rev. St. Ind. 1881, §§ 5115, 5117, 5130, the wife could borrow the money of her husband.— *Harrell v. Harrell*, S. C. Ind., Jan. 24, 1889; 19 N. E. Rep. 621.

50. HUSBAND AND WIFE— Wife's Separate Estate.—— As to right of the wife in husband's property, as against the creditor, the same having been conveyed to him by her.—*Meade v. Stairs*, Ky. Ct. App., Dec. 20, 1888; 10 S. W. Rep. 272.

51. HUSBAND AND WIFE— Separate Estate — Estoppel. ——A married woman may show that a note made by her and secured by mortgage was not a contract in relation to her separate estate.— *Tribble v. Poore*, S. C. S. Car., Jan. 3, 1889; 8 S. E. Rep. 541.

52. INSANITY—Estoppel—Res Adjudicata. —— Where a husband is induced to execute a deed of certain property to his wife, and afterwards the wife secures an annulment of the marriage on the ground that the husband was insane at the time, she cannot deny the insanity of the husband in an action brought to set aside the deed on account of such insanity.—*Warfield v. Warfield*, S. C. Iowa, Jan. 23, 1889; 41 N. W. Rep. 383.

53. INJUNCTION—Opening Street — Evidence. —— An injunction against the opening of streets and alleys should not be granted on evidence of mere naked possession. — *Smith v. City of Navasota*, S. C. Tex., Jan. 15, 1889; 10 S. W. Rep. 414.

54. INJUNCTION—Supreme Court.——Under what circumstances, the supreme court will grant temporary injunction to operate pending an appeal in a cause before it.—*Cohen v. L'ecqul*, S. C. Fla., Dec. 22, 1888; 5 South. Rep. 235.

55. INSOLVENCY—Fraud— Composition with Creditors. ——Under Rev. St. Me. ch. 70, § 62, requires the existence of willful fraud before a creditor to a composition can bring action against insolvent for balance of debt. — *Corbosse Bk. v. Rich*, S. J. C. Me., Jan. 1, 1889; 16 Atl. Rep. 506.

56. INSURANCE—Contracts—Conditions. —— In a suit upon a contract to issue a policy of insurance, there can be no recovery for a loss, unless the conditions as to notice and statement of loss contained in policies of the form usually issued by defendant are complied with or waived. — *Barre v. Council Bluffs Ins. Co.*, S. C. Iowa, Jan. 22, 1889; 41 N. W. Rep. 373.

57. INSURANCE AGENT— Bond. —— The sureties upon the bond of an insurance agent may be charged with liabilities and defaults prior to its execution in the same month. — *Brit. Amer. Assur. Co. v. Neil*, S. C. Iowa, Jan. 24, 1889; 41 N. W. Rep. 383.

58. INTOXICATING LIQUORS.——Questions of sufficiency of the evidence under Pub. St. Mass. ch. 101, § 6, for keeping tenement for the illegal sale of intoxicating liquors. — *Commonwealth v. Bryan*, S. J. C. Mass., Feb. 6, 1889; 19 N. E. Rep. 555.

59. INTOXICATING LIQUORS—Damages.—— In an action by a wife to recover damages for the intoxication of her husband, an instruction that it is not to be understood that a husband is only obligated to furnish a bare subsistence for his wife, but to the extent of his ability he is under obligation to provide his wife those comforts and surroundings reasonable and necessary for home enjoyment in the society in which she lives, is not objectionable.— *Thill v. Polman*, S. C. Iowa, Jan., 23, 1889; 41 N. W. Rep. 325.

60. INTOXICATING LIQUORS—Evidence.——On the trial of a complaint for unlawfully keeping intoxicating liquors, evidence that intoxicating liquor was found in a public house, as well as in a barn connected with it, both being owned by defendant, was competent.—*Commonwealth v. Tenney*, S. J. C. Mass., Feb. 6, 1889; 19 N. E. Rep. 556.

61. INTOXICATING LIQUORS— Joint Offense. —— Upon indictment against two for illegal keeping, etc., of intoxicating liquor in a tenement "by them used" one may be convicted and the other acquitted. — *Commonwealth v. Garon*, S. J. C. Mass., Feb. 6, 1889; 19 N. E. Rep. 554.

62. INTOXICATING LIQUORS — License. —— Where by rule of board of aldermen, no license shall be granted unless six members assent, this rule determines the matter in every case. —*Commonwealth v. Moran*, S. J. C. Mass., Feb. 6, 1889; 19 N. E. Rep. 554.

63. INTOXICATING LIQUORS — Ordinances — Construction.——Construction of town ordinances as to power of council to inflict penalty for violations.—*Town Council v. Calhoun*, S. C. S. Car., Jan. 3, 1889; 8 S. E. Rep. 539.

64. INTOXICATING LIQUORS — Repeal of Statute. —— Acts 21st Gen. Assem. Iowa, ch. 83, takes away, though containing no express repeal, the right of persons not pharmacists to sell for medical purposes, under Code Iowa, § 1526.—*State v. Aulman*, S. C. Iowa, Jan. 23, 1889; 41 N. W. Rep. 379.

65. JUDICIAL SALE — Failure of Purchaser to Comply with Bid.—— Purchaser at judicial sale who refuses to comply with his bid is liable for the deficiency upon a resale.—*Camden v. Mayhew*, U. S. S. C., Jan. 14, 1889; 9 S. C. Rep. 246.

66. JUDGMENT — Equitable Relief. —— A defendant against whom judgment has been rendered on a note cannot have the judgment set aside on an allegation made for the first time that the note was obtained by fraud.—*Fox v. Mt. Sterling Bank*, Ky. Ct. App., Jan. 10, 1889; 10 S. W. Rep. 368.

67. JUDGMENT—Res Adjudicata—Claim against County. ——A adjudication of a claim against a county by the board of commissioners subsequent to the repeal of Rev. St. Ind. 1881, § 5771, and prior to the passage of Acts 1885, p. 80, § 3, allowing the claimant, at his option, to appeal or bring suit against the county, was final, unless appealed from.—*Maxwell v. Board of Commissioners*, S. C. Ind., Jan. 23, 1889; 18 N. E. Rep. 617.

69. JURISDICTION—Federal Courts — Dismissal. —— Construction of act Cong. March 3, 1875, § 5, as to dismissal of suit for want of jurisdiction.— *Fuller v. Ins. Co.*, U. S. C. C. (N. Y.), Jan. 7, 1889; 37 Fed. Rep. 163.

69. LIMITATION OF ACTIONS — Suits against Representatives.——Construction of Code Tenn. § 3454, with reference to the time limited for commencing actions against personal representatives.— *Bright v. Moore*, S. C. Tenn., Jan. 1, 1889; 10 S. W. Rep. 356.

70. LIS PENDENS—Purchase of Lands.——A purchaser *pendente lite*, is bound by the judgment rendered against the person from whom he purchased.— *Wallace v. Marquett*, Ky. Ct. App., Jan. 17, 1889; 10 S. W. Rep. 374.

71. MANDAMUS— Exercise of Discretion. —— *Mandamus* will not lie to control the exercise of a discretionary authority.— *Satterlee v. Strider*, W. Va. Ct. App., Dec. 1, 1888; 8 S. E. Rep. 552.

72. MARINE INSURANCE—Insurable Interest—Advances by Part Owner. —— A part owner of a vessel, who makes advances on a venture engaged in by himself and the other owners, has a lien on the vessel and cargo for his reimbursement which constitutes an insurable interest.—*International Marine Ins. Co. v. Winsmore*, S. C. Penn., Jan. 28, 1889; 16 Atl. Rep. 516.

73. MARITIME LIENS—Seaman's Wages. —— *Held*, under facts that libelant was entitled to a seaman's lien for services rendered, except during the trip he actually served as master. — *Peterson v. The Nellie and Annie*, U. S. D. C. (Wis.), Jan. 7, 1889; 37 Fed. Rep. 217.

74. MASTER AND SERVANT— Negligence — Fellow servant.——A section boss and section hand are not fellow-servants. — *Mealman v. R. R. Co.*, U. S. C. C. (Colo.), Jan. 10, 1889; 37 Fed. Rep. 189.

75. MUNICIPAL CORPORATIONS — Contracts. —— Construction of the act 1887, consolidating cities of New Orleans and Jefferson and the former held responsible for contract obligations of the latter.—*Jeff. Gas Light Co. v. City of N. O.*, S. C. La., Dec. 3, 1888; 5 South. Rep. 262.

76. MUNICIPAL CORPORATIONS — Parks — Discontinuance.——The general assembly has power to authorize the discontinuance of a public park, and the alienation of the land.—*Mowry v. City of Providence*, S. C. R. I., Jan. 26, 1889; 16 Atl. Rep. 511.

77. MUNICIPAL CORPORATIONS—Non-uses of Franchise —Dissolution.—— Non-user, or failure to elect officers for a series of years, does not work a dissolution of a municipal corporation created by act of the lesislature. —*Buford v. State*, S. C. Tex., Nov. 30, 1888; 10 S. W. Rep. 401.

78. NEGLIGENCE—Defective Streets — Evidence. —— In an action to recover for personal injuries alleged to have been received by reason of defects in one of the streets of defendant city: *Held*, evidence was admissible, tending to show that at the time of the accident plaintiff was intoxicated. — *Frenbach v. City of Waterloo*, S. C. Iowa, Jan. 22, 1889; 41 N. W. Rep. 370.

79. NEGOTIABLE INSTRUMENTS. —— The defendant bank, telegraphed to the plaintiff at L. Cal., that it would pay B's draft upon it for $2,000. B's draft as subsequently drawn and delivered, was for $2,000, "with exchange on New York:" *Held*, that the acceptance of the bank did not cover on the draft as drawn. — *Lindley v. First Nat. Bank of Waterloo*, S. C. Iowa, Jan. 23, 1889; 41 N. W. Rep. 381.

80. NEGOTIABLE INSTRUMENTS— Delivery — Evidence. ——*Held*, under the testimony that there was no legal delivery of the notes in controversy.— *Gordon v. Adams*, S. C. Ill., Jan. 25, 1889; 19 N. E. Rep. 557.

81. NEW TRIAL—Appeal.—— The discretion lodged in the lower court in the matter of granting new trials will not be disturbed by the supreme court except in a clear case of abuse.—*Peebles v. Peebles*, S. C. Iowa, Jan. 24, 1889; 41 N. W. Rep. 387.

82. NEW TRIAL—Newly-discovered Evidence—Petition. ——An affidavit on a petition for new trial for newly-discovered testimony, which does not show what the testimony is, is sufficient. — *Harris v. R. R.*, S. C. R. I., Dec. 5, 1888; 16 Atl. Rep. 512.

83. PARTIES— Intervention. —— The denial of a petition to intervene in an action brought to establish a trust in certain real estate, by one claiming the legal title to and possession of a certain portion of the premises involved, is not error.—*Curtis v. Lathrop*, S. C. Colo., Jan. 18, 1889; 20 Pac. Rep. 250.

84. PARTIES—Trust. —— The object of the action being to establish an alleged trust, and C not being interested in this question was not a necessary party under Code Colo. § 16. — *Pollard v. Lathrop*, S. C. Colo., Jan. 18, 1889; 20 Pac. Rep. 251.

85. PARTITION—Sale of Undivided Interest.——Under Old Code Md. art. 16, § 99: *Held*, that it was error to decree sale of undivided interest in land.— *Dugan v. Baltimore*, Md. Ct. App., Jan. 9, 1889; 16 Atl. Rep. 503.

86. PARTNERSHIP — Accounting. —— *Held*, under the facts that a proper settlement was made by the commissioner appointed for that purpose.—*Hume v. McNees*, Ky. Ct. App., Jan. 19, 1889; 10 S. W. Rep. 384.

87. PARTNERSHIP—Covenant—Action of—Evidence.—— In covenant against a partnership question as to when sealed instrument signed by one partner only is admissible in evidence. — *Martin v. Bray*, S. C. Penn., Jan. 28, 1889; 16 Atl. Rep. 515.

88. PARTNERSHIP—Firm Property— Patents.——Where one entering a partnership puts in an invention as part of the capital stock, a patent obtained thereon becomes partnership property. — *Hill v. Miller*, S. C. Cal., Jan. 25, 1889; 20 Psc. Rep. 304.

89. PATENTS FOR INVENTIONS — Repairs by Licensee. ——The licensee of a patented machine has the right to replace parts which wear out, to discard useless parts and add new ones to improve its action. — *Young v. Foerster*, U. S. C. C. (N. Y.), Jan. 8, 1889; 37 Fed. Rep. 203.

90. PAYMENT—Presumption. —— A court will not enforce payment of a note fourteen years after it was made. Payment will be presumed. — *Wilson v. Suggett*, Ky. Ct. App., Jan. 19, 1889; 10 S. W. Rep. 382.

91. PLEADING— Affidavit of Defense. —— An affidavit of defense is insufficient unless it sets forth explicitly all the facts necessary to constitute a substantial defense. —*Reed v. Raymond*, U. S. C. C. (Penn.), Oct. 23, 1888; 37 Fed. Rep. 186.

92. PLEADING— General Denial. —— A general denial of all material allegations in the complaint is authorized in Code Colo. 1887.— *Goodrich v. R. R.*, U. S. C. C. (Colo.), Jan. 21, 1889; 37 Fed. Rep. 182.

93. POST-OFFICE — Embezzlement of Letter. —— An employee of the post-office can only be convicted of embezzling such letters as are proper subjects of deposit in the mail. — *United States v. Taylor*, U. S. D. C. (Mich.), Dec. 31, 1888; 37 Fed. Rep. 200.

94. PRINCIPAL AND AGENT—Ratification.——A written contract for the purchase of land, made by an agent in his own name, but really for the benefit of another, though without authority of the latter, is ratified by the principal if he takes possession of the land.—*Hall v. White*, S. C. Penn., Jan. 7, 1889; 16 Atl. Rep. 521.

95. PRINCIPAL AND SURETY—Release of Co-surety.—— A release of a levy of an execution upon the property of a surety will not release a co-surety from liability.— *Alexander's Heirs v. Byrd*, Va. Ct. App., Jan. 24, 1889; 8 S. E. Rep. 577.

96. QUO WARRANTO— Title to Offices — Qualifications. ——As the law prohibits a member of a school board from contracting or performing any work, and from furnishing any materials used in such work, which is under the supervision, direction, or control of such officer, the court, in the exercise of its discretion will refuse to one who has such contract the extraordinary remedy of *quo warranto* to invest him with the office he seeks. — *Weston v. Lane*, S. C. Kan., Jan. 5, 1889; 20 Pac. Rep. 260.

97. RAILROAD COMPANIES — Fire Set by Locomotives— Negligence.——The damage to property by fire escaping from a railroad engine raises an inference of negligence, consisting in a defect in the construction of the engine, or in the appliances used, or in want of care in its management. — *Louisville & N. R. Co. v. Reese*, S. C. Ala., Jan. 9, 1889; 5 South. Rep. 283.

98. RAILROAD COMPANIES—Killing Stock—Farm Crossings.——Under acts Ind. 1885, pp. 148, 224, railway companies, in the absence of negligence, are not liable for injuring or killing stock at private crossings.—*Louisville N. A. & C. Ry. Co. v. Etzler*, S. C. Ind., Jan. 23, 1889; 19 N. E. Rep. 615.

99. RAILROAD COMPANIES—Right of Way. —— A railroad company has exclusive dominion over its right of way and depot grounds and may exclude trespassers thereon. — *Fluker v. Georgia, etc. Co.*, S. C Ga., Jan. 21, 1889; 8 S. E. Rep. 529.

100. RAILROAD COMPANIES — Subscription to Capital Stock.—— Question of construction of subscription notes with reference to the maturity of the notes and conditions precedent to their payment. — *Johnson v. Ga. R. Co.*, S. C. Ga., Jan. 21, 1889; 8 S. E. Rep. 581.

101. RAILROAD COMPANIES — Taxation Bridges. —— Comp. Stat. Neb. ch. 77, § 39, does not require returns for taxation, of bridges constructed across the Missouri river. — *Cass County v. C. B., & Q. R. R. Co.*, S. C. Neb. Jan. 3, 1889; 41 N. W. Rep. 246.

102. REMOVAL OF CAUSES—Separable Controversy.—— A lessee is interested in the controversy in a suit to set aside his lessor's title to the leased premises as fraudulent, and when he, being a resident of the same State as complaint, is made a party defendant, the controversy is not wholly between citizens of the different States, and is not removable.—*Miller v. Sharp*, U. S. C. C. (Iowa), Jan. 9, 1889; 37 Fed. Rep. 161.

103. REPLEVIN — Adverse Possession. —— Code Ga. § 4038, construed with reference to defense of peaceable possession for four years.— *Gaillard v. Hudson*, S. C. Ga., Jan. 14, 1889; 8 S. E. Rep. 534.

104. REPLEVIN—Affidavit—Amendment.——The original affidavit in replevin may be amended so as to state sufficiently what is already stated therein indefinitely. — *Meyer v. Lane*, S. C. Kan., Jan. 5, 20 Pac. Rep. 258.

105. RES ADJUDICATA.—— An assignee of mining royalties as security, of which an undivided moiety has been assigned to others, binds such others by her acts in suing for such royalties, though she be in control of the security, and have superior rights in it, since she is in any case trustee for the others. — *Perry v. Mills*, S. C. Iowa, Jan. 23, 1889; 41 N. W. Rep. 378.

106. SALVAGE—Derelict. —— *Held*, under facts that a vessel was *prima facie* derelict and abandoned. — *The Ann L. Lockwood*, U. S. D. C. (Del.), Dec. 28, 1888; 37 Fed. Rep. 283.

107. SUPREME COURT — Review of Territorial Courts. ——Rev. St. U. S. § 702, does not give the supreme court authority to review the decision of the supreme court of the territory of Montana in a criminal case.—*Farnsworth v. Montana*, U. S. S. C. Jan. 14, 1889; 9 S. C. Rep. 253.

108. SHIPPING—Bills of Lading—Misconduct of Master. ——A master who inserts in the bill of lading, "Vessel not responsible for difference in weight," is not chargeable with misconduct in signing such bill of lading though it calls for more cargo than was actually received on board. — *McKay v. Ennis*, U. S. D. C. (N. Y.), Dec. 21, 1888; 37 Fed. Rep. 229.

109. SPECIFIC PERFORMANCE—Laches. ——Where defendant who has contracted with plaintiff for right of way and deposited the money with H and failed for two years to tender deed to H, who in the meantime became insolvent, plaintiff denied remedy through laches.—*C. R. I., & P. Ry. Co. v. Wis. I. & N. Ry. Co.*, S. C. Iowa, Jan. 23, 1889; 41 N. W. Rep. 375.

110. TAXATION—Deeds—Curative Acts—Constitutional Law.—— The owner of land, in paying the amount of taxes levied upon it, is authorized to rely upon the treasurer for the proper application of the money paid, and the treasurer's failure to make such proper application is ground for redemption from a sale for such taxes.—*Henderson v. Robinson*, S. C. Iowa, Jan. 22, 1889; 41 N. W. Rep. 371.

111. TAXATION—Tax-sales. —— Construction of Code Va. § 469, as to sale of lands for delinquent taxes.—*Couch v. Marye*, Va. Ct. App., Nov. 22, 1888; 8 S. E. Rep. 582.

112. TRESPASS—Damages.—— In an action for damages for wrongful occupation of land, where evidence fails to show length of use of land and value thereof, etc., plaintiff can recover only nominal damages.—*Williams v. Brown*, S. C. Iowa, Jan. 23, 1889; 41 N. W. Rep. 377.

113. TRIAL—Verdict—Waiver of Objection. ——A verdict allowing a sum for items not accurately declared for will not be set aside when defendant has neither demurred to the writ nor objected to evidence in support of such items.— *Brown v. Reed*, S. J. C. Me., Jan. 3, 1889; 16 Atl. Rep. 504.

114. TRUSTS—Construction.—— Construction of a trust to pay debts when creditors compromise their claims.—*Tennent v. Headlee*, W. Va. Ct. App., Nov. 24, 1888; 8 S. E. Rep. 544.

115. TRUSTS—Void for Uncertainty— Resulting Trusts. ——Where property is conveyed upon a void trust, a resulting trust in the same arises in favor of the grantors.—*Heiskell v. Trout*, W. Va. Ct. App., Dec. 1, 1888; 8 S. E. Rep. 557.

116. UNITED STATES DISTRICT ATTORNEY — Fees. —— The excess of fees taxed and received by a district attorney over the amount allowed by statute belongs to the government.—*Bliss v. United States*, U. S. C. C. (Mo.), Jan. 2, 1889; 37 Fed. Rep. 191.

117. VENDOR AND VENDEE—Contract.——An agreement for the conveyance of a designated number of acres "in" a specified larger tract of land, is ineffectual, because of uncertainty, to transfer or create an interest or right in any land.—*Brockway v. Frost*, S. C. Minn., Jan. 31, 1889; 41 N. W. Rep. 411.

118. WILLS—Construction — Bodily Heirs. —— Construction of use words "bodily heirs" in a will.—*Mitchell v. Simpson*, Ky. Ct. App., Jan. 15, 1889; 10 S. W. Rep. 372.

119. WILLS—Construction—Legacy.—— Under a clause in a will bequeathing money to a legatee "or his legal representatives," the fund should be paid to the guardian of the legatee, an infant, as such bequest vests absolutely in the legatee.— *Livermore v. Somers*, N. J. Ct. Chan., Jan. 18, 1889; 16 Atl. Rep. 513.

120. WILLS—Construction— Remainder. —— Construction of will with reference to the time when remaindermen are entitled to possession of property devised. — *Crawley v. Blackman*, S. C. Ga., Jan. 9, 1889; 8 S. E. Rep. 533.

121. WILLS—Construction— Words of Inheritance.—— Construction of a will as to whether "heirs" was used as word of inheritance or purchase. — *Wedekind v. Hallenberg*, Ky. Ct. App., Jan. 12, 1889; 10 S. W. Rep. 368.

122. WILLS— Election of Husband. —— Construction of act Pa. May 4, 1855, as to election of husband in property of deceased wife. — *Appeal of Lee*, S. C. Pa., Jan. 28, 1889; 16 Atl. Rep. 514.

123. WILLS—Mental Incapacity.—— Interpretation of phrase "in a proper state" to dispose of estate in an instruction to jury in an action to set aside a will for mental incapacity in the devisor. — *Gordon v. Morrow*, Ky. Ct. App., Jan. 17, 1889; 10 S. W. Rep. 373.

124. WITNESS— Confidential Relation — Attorney and Client. —— Under Acts Ga. 1887, p. 30, excusing an attorney from testifying against his client, unless his information is derived from his client by virtue of his relation as attorney, he is compellable to testify. — *Skellie v. James*, S. C. Ga., Jan. 25, 1889; 8 S. E. Rep. 607.

125. WITNESS—Impeachment. —— Where defendant had, on cross-examination of plaintiff, read certain parts of her deposition, taken by him, for the purpose of impeachment, it was competent for plaintiff to read the whole to the jury.— *Korte v. Hofman*, S. C. Mo., Feb. 4, 1889; 10 S. W. Rep. 390.